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No. __, Original

FILED

FEB 18 2000

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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BRIEF IN SUPPORT OF MOTION AND BILL OF COMPLAINT

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February 18, 2000

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MOTION FOR LEAVE TO FILE
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v.

STATE OF MARYLAND,

Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The Commonwealth of Virginia, by its Attorney General, Mark L. Earley, and pursuant to Rule 17 of the United States Supreme Court, moves this Court for leave to file its Complaint against the State of Maryland, for the reasons stated in the accompanying Brief in Support.

Respectfully submitted,

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February 18, 2000

THE COMMONWEALTH OF VIRGINIA'S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

QUESTIONS PRESENTED FOR REVIEW

1. Do the rights granted to Virginia pursuant to Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958, apply upstream of the tidal portion of the Potomac River?

2. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River?

3. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a water appropriation permit in order to withdraw water from the Potomac River?

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The Commonwealth of Virginia, to establish its sovereign rights to the use of the Potomac River, submits this brief in support of its motion for leave to file a Complaint against the State of Maryland, pursuant to this Court's exclusive, original jurisdiction under Art. III, § 2 of the Constitution of the United States, and 28 U.S.C. § 1251(a).

INTRODUCTION

For more than 200 years, the Potomac River (the "Potomac" or "River") has been the subject of formal compacts between Virginia and Maryland. Under those compacts, Virginia enjoys the right to make and carry out improvements extending into the River from the Virginia shore. In keeping with those rights, the Fairfax County Water Authority ("the Authority"), a political subdivision of Virginia, desires to construct a drinking water intake structure extending into the channel of the River to provide a new intake point. Nothing in the compacts requires the Authority to obtain Maryland's approval for this; however, as a matter of comity and for ease of administration, the Authority applied to Maryland for a waterway construction permit. That was four years ago. No permit has been issued.

The United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question. During the intervening years, the Authority has agreed to all reasonable suggestions by Maryland about the construction of the offshore intake, including the suggestion that the intake structure be kept at least 2½ feet below the surface of the River. Maryland officials have stipulated that such a structure would not obstruct or injure the navigation of the River, nor disturb fisheries, nor adversely affect the River's aesthetic beauty. Maryland also concedes that the project would save Virginia millions of dollars in solids-handling costs. Still, the permit has not been issued.

Instead, Maryland officials, under pressure from Maryland State legislators and from the Maryland Governor, have insisted that Virginia demonstrate to their satisfaction the necessity for

the offshore intake. Nothing in the compacts permits Maryland to decide whether Virginia "needs" to construct improvements appurtenant to the Virginia shore.

More than one million Virginians depend on the Potomac River for their water. The existing intake on the Virginia shore withdraws water that is significantly inferior to water in the channel, making it more expensive to treat and less reliable as a source of clean, healthful water. The Virginia Commissioner of Health has found that constructing the offshore intake is an essential public health initiative.

Maryland denies that Virginia has compact rights above the tidal reach of the Potomac River and insists that it may regulate Virginia's access to and use of the River. Unable to resolve its dispute with Maryland despite its best efforts, Virginia invokes this Court's original jurisdiction to vindicate its compact rights and to restrain Maryland's continued interference with those rights.

STATEMENT OF THE CASE

The Potomac River provides a critical source of drinking water for more than 3.5 million people in the Washington metropolitan areas of Maryland, Virginia, and the District of Columbia. The mean low-water mark on the Virginia shore is the boundary line between Virginia and Maryland. The respective rights of Virginia and Maryland concerning the River are set forth in the Compact of 1785, the Black-Jenkins Award of 1877, the Potomac River Compact of 1958 and the Low Flow Allocation Agreement of 1978. Virginia seeks through this original action to vindicate Virginia's right to use the waters of the Potomac River and to build improvements that extend beyond the low-water mark on the Virginia shore.

A. Compacts and Interstate Agreements.

1. *The Compact of 1785 Between Maryland and Virginia.*

In 1776, Virginia and Maryland disputed the location of their common boundary, Virginia claiming to the north shore of the Potomac River and Maryland claiming to the south shore.

In its Constitution of 1776, Virginia relinquished its claim to "territories contained within the charters erecting the colon[y] [of] Maryland," 1776 Va. Const. Art. XXI, *reprinted in* 9 Hening's Statutes at Large c. II 112, 118. However, Virginia retained full jurisdiction over, and use of, the Potomac River. Article XXI of the Virginia Constitution reserved for Virginia:

> the free navigation and use of the rivers Potowmack [Potomac] and Pohomoke [Pocomoke], with the property on the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.

Id. Art. XXI.

Conflicting claims concerning the Potomac River generated serious tensions between the States. *See Wharton v. Wise*, 153 U.S. 155, 162 (1894).

Commissioners appointed by Virginia and Maryland met at Mt. Vernon in March 1785 and agreed on a thirteen-article Compact that was ratified by the legislatures of both States. 1785 Va. Acts c. XVII, *codified in part at* Va. Code Ann. § 7.1-7 (Michie 1999); 1786 Md. Laws c. I (App. A). Article VII of the Compact of 1785 provided:

> The citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, *and the privilege of making and carrying out wharves and other improvements*, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

App. A, 1786 Md. Laws c. I (emphasis added), 1785 Va. Acts c. XVII (emphasis added). Article VIII of the Compact provided, *inter alia*, that "[a]ll laws and regulations" necessary for the preservation of fish in the Potomac and Pocomoke, or for maintaining the channel and navigation thereof, "shall be made with the mutual consent and approbation of both states." *Id.* Article XIII provided for the articles to be laid before the legislatures of both Maryland and Virginia and, upon ratification, "never to be repealed, or altered, by either, without the consent of the other." *Id.*

In 1894, this Court in *Wharton v. Wise*, 153 U.S. 155 (1894), held that the Compact was valid under the Articles of Confederation when the Compact was adopted, that its validity continued after the ratification of the Constitution of the United States (except to the extent that certain of its provisions concerning commerce were superseded by the Federal Constitution), and that Congress further consented to the Compact when it confirmed the Black-Jenkins Award of 1877. 153 U.S. at 172-73.

2. *The Black-Jenkins Award.*

The Compact of 1785 did not settle the boundary dispute between Maryland and Virginia. In 1874, the general assemblies of both states mutually authorized the matter of the "true line of boundary" to be submitted to binding arbitration, with the proviso that:

> [N]either of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever.

App. B, 1874 Va. Acts c. 135; 1874 Md. Acts c. 247.

The resulting Black-Jenkins Award, named after the arbitrators, Jeremiah S. Black of Pennsylvania, and Charles J.

Jenkins of Georgia, determined that the boundary lay at the low-water mark on the Virginia shore of the Potomac River, beginning at the Virginia-West Virginia border. Va. Code Ann. § 7.1-7 (Michie 1999). Both states ratified the Award and Congress consented to it in 1879. App. D, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483.

The final clause of the Award provided that:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to *such use of the river* ***beyond*** *the line of low-water mark* as may be necessary to the *full enjoyment* of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Id. (emphasis added).

3. *Maryland v. West Virginia.*

In resolving the dispute between Maryland and West Virginia concerning their Potomac River boundary, this Court incorporated portions of the Compact of 1785 and the Black-Jenkins Award of 1877 into the final decree. *Maryland v. West Virginia*, 217 U.S. 577, 578-81, 585 (1910). The Court ruled that the boundary line between the States was the low-water mark on the southern shore of the Potomac. *Id.* at 580. The Court quoted from the opinion of Black and Jenkins that:

> Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

Id. at 580. The Court concluded that:

> [T]he privileges reserved to the citizens of the respective states in the compact of 1785, and its

> subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.

Id. at 580-81.

4. *The Potomac River Compact of 1958.*

In 1957, this Court granted Virginia leave to file an original action against Maryland to enjoin Maryland from abrogating the Compact of 1785 by unilaterally regulating fishing activities in the tidal portion of the Potomac River. *Virginia v. Maryland*, 355 U.S. 269 (1957); Commonwealth of Virginia, Motion for Leave to File Bill of Complaint and Bill of Complaint, *Virginia v. Maryland*, No. 11, Original (1957). The litigation was settled by the negotiation and adoption of the Potomac River Compact of 1958. App. E, Report of the Commissioners to the Governors of Maryland and Virginia, *The Potomac River Compact of 1958*, *reprinted in* Virginia House Document No. 22, at 8 (1960), *codified at* Va. Code Ann. § 28.2-1001 (Michie 1997), and Md. Code Ann., Nat. Res. § 4-306 (1999 Supp.).

Congress consented to the new Compact on October 10, 1962. Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962). While Article IX of the 1958 Compact provided for the new Compact to supersede the Compact of 1785, the new Compact expressly carried forward and affirmed the rights of Virginians concerning the use of the Potomac River, including the right to build wharves and improvements that had been expressly protected by Article VII of the Compact of 1785. Article VII, section 1, of the Potomac River Compact of 1958 states:

> The rights, *including the privilege of erecting and maintaining wharves and other improvements*, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact, and the decisions of the courts construing that portion of Article VII

> of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.

App. E, Potomac River Compact of 1958, Art. VII, § 1 (emphasis added).

5. *Use of the Potomac River Since 1958.*

The three major water suppliers to the Washington metropolitan area are the Washington Aqueduct Division of the U.S. Army Corps of Engineers (the "Aqueduct"), the Washington Suburban Sanitary Commission ("WSSC"), a bi-county governmental agency of the State of Maryland, and the Fairfax County Water Authority, a political subdivision created under the laws of the Commonwealth of Virginia. The WSSC supplies treated water to Montgomery County and Prince George's County, Maryland, drawn from the Potomac River and the Patuxent Reservoir. The Aqueduct provides treated water drawn from the Potomac River for the District of Columbia and portions of northern Virginia, including Arlington County, the City of Falls Church and eastern Fairfax County. The Authority provides treated water for another 1.2 million people in northern Virginia. The Authority draws half of its water from the Potomac River, and the balance from the Occoquan River Reservoir in southern Fairfax County.

a. *The Low Flow Allocation Agreement of 1978.*

In Section 181 of the Water Resources Development Act of 1976, Congress conditioned federal approval for WSSC's construction of a Potomac River water diversion structure on the negotiation and execution of a written agreement providing an enforceable schedule for allocating the withdrawal of water from the River during periods of low flow. Pub. L. No. 94-587, § 181, 90 Stat. 2939 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a. This legislation led to the negotiation and execution of the Potomac River Low Flow Allocation Agreement of 1978 ("LFAA") (App. F), signed by the United States Secretary of the Army, Maryland, Virginia, the District of

Columbia, the WSSC, and the Authority.[1] The LFAA expressly recognized the riparian interests of "communities located in Virginia" to withdraw and use water from the Potomac River. (App. F at 79a). The Commonwealth of Virginia signed the LFAA and was defined as a "user" of the River "for and on behalf of herself and each of her political subdivisions and authorities (including the Authority)." (*Id.* at Art. 2(C)(1), App. F at 89a).[2]

b. *The Water Supply Cooperation Agreement of 1982.*

On July 22, 1982, the U.S. Army Corps of Engineers, the District of Columbia, the Section for Cooperative Water Supply Operations on the Potomac of the Interstate Commission on the Potomac River Basin ("ICPRB"),[3] and the three major water

1. The LFAA has the status of an interstate compact, Congress having authorized its execution in advance. *Cuyler v. Adams*, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

2. In Congressional hearings leading up to the enactment of Section 181 of the Water Resources Development Act of 1976 and the LFAA, Maryland representatives conceded the right of Virginia and its governmental subdivisions to use the Potomac River. Representative Gude of Maryland repeatedly recognized Virginia's "riparian interest in the Potomac." *See* Omnibus Water Resources Development Act of 1976, Hearings before the Subcomm. on Water Resources of the Senate Comm. on Public Works, 94th Cong., 2d Sess. 2008, 2009 (1976) (statement of Rep. Gude); *id.* at 2012 (stating that "Virginia's political subdivisions do have riparian rights and these are protected."). An Assistant Attorney General of Maryland similarly stated: "We recognize that the State of Virginia has riparian rights, and those rights are equivalent or equal to the riparian rights of Maryland communities, and there is no intent to take anything away from the State of Virginia." *Id.* at 2102 (statement of Warren Rich).

3. The ICPRB was created in 1940 by an interstate compact entered into between the states of Maryland, West Virginia, Virginia, Pennsylvania and the District of Columbia, and approved by Congress. 33 U.S.C. §§ 567b, 567b-1. Among other duties, the ICPRB performs analyses and studies relating to water quality, supply and demand in the Potomac River Basin.

utilities (the Aqueduct, WSSC and FCWA) signed a Water Supply Coordination Agreement (the "CO-OP Agreement") (App. G). The CO-OP Agreement established a formal system of cooperation among the three water utilities and the ICPRB to ensure the adequacy of the future water supply for the Washington metropolitan area. (*Id.*, Art. 1). The Aqueduct, the WSSC, the Authority and District of Columbia promised under the CO-OP Agreement to coordinate their use of their respective water supply systems through the ICPRB "to provide the optimal utilization of all available water supply facilities for the benefit of the inhabitants of the Washington Metropolitan Area." (*Id.*, Art. 1).

In 1982, concurrently with the execution of the CO-OP Agreement, the Aqueduct, the WSSC, the Authority and the District of Columbia also entered into a series of other cost-sharing agreements to provide storage capacity in upstream reservoirs in Maryland and West Virginia, in order to supplement the supply of water for the Potomac River in times of low flow. The coordinated operation of the region's water resources will enable the utilities to meet the area's demands, without imposing restrictions, through at least the year 2015, even under repeated recurrences of the historic drought of record.

B. Maryland Statutory Requirements Concerning the Use of the Potomac River.

Maryland requires that any person seeking to construct an improvement in the Potomac River obtain a waterway construction permit from the Maryland Department of Environment ("MDE"). Md. Code Ann., Envir. §§ 5-504, 5-507 (1996); Md. Regs. Code tit. 26, § 26.17.04 (1999). Maryland also requires that anyone seeking to withdraw water from the Potomac River obtain a water appropriation permit from MDE. Md. Code Ann., Envir. § 5-502 (1996); Md. Regs. Code tit. 26, § 26.17.06.03 (1999). MDE purports to retain the authority to deny a permit application if it determines in its sole discretion that a waterway construction project, or a water

appropriation request, is "unnecessary." A violation of the Maryland permitting statutes or regulations constitutes a misdemeanor, subject to a fine up to $500 per day for each day of the offense, not to exceed a total fine of $25,000. Md. Code Ann., Envir. § 5-514 (1996).

C. The Present Controversy.

Maryland's treatment of Virginia over the course of the past four years gives rise to the present controversy.

1. *The Authority's Offshore Intake Project.*

The Authority is a political subdivision created under the laws of Virginia, exercising "essential governmental functions to provide for the public health and welfare. . . ." Va. Code Ann. § 15.2-5114 (Michie 1997). Since 1982, the Authority has withdrawn Potomac River water through an intake located along the Virginia shoreline at Lowes Island in Loudoun County, Virginia. In the ensuing eighteen years, the Authority has experienced a number of serious problems, including periodic blockages and plant shutdowns resulting from clogging of the intake by grass, leaves, and ice. In addition, following local rainstorms, when the River has been influenced by runoff from several upstream tributaries, the raw water at the shoreline has been more difficult and expensive to treat due to high turbidity (a measurement of the amount of particulate matter suspended in the water), and low pH and alkalinity.

A comprehensive study by the Authority's outside engineering firm concluded that the Authority should construct an alternate intake 725 feet offshore from the existing intake, in the main channel of the River. The Potomac River is 2000 feet wide at that point. Offshore intakes are common across the country. The study determined that an offshore intake would reduce, if not eliminate, the Authority's operational problems arising from clogging at the shore intake, reduce solids loading at the treatment plant by 40% to 50%, and dramatically improve

the quality of the raw water. The present value associated with the reduction in solids disposal and chemical treatment costs alone would exceed $13 million.

The Authority's offshore intake would also provide significant public health benefits to Virginia. Mean turbidity at the shore is 50% greater than in the channel of the river. When local rainfall exceeds 1/2 inch, mean and median turbidity and suspended solids at the Authority's shore intake surge to more than four times that in the channel of the river, where turbidity and suspended solids levels change very little. These variable conditions significantly interfere with the smooth operation of the water treatment plant and greatly increase the risk of human error in producing finished drinking water free of contaminants. The WSSC's water intake on the Maryland shore, just downstream from Watt's Branch, experiences even poorer water quality due to local runoff in Maryland. Mean turbidity at the WSSC's shore intake is more than 30% greater than at the Authority's shore intake.

Although the Authority currently produces finished drinking water that complies with all federal and state water quality standards, high turbidity in raw water following local rainstorms is associated with elevated levels of waterborne pathogens, including *Cryptosporidium* and *Giardia*. The species *Cryptosporidium parvum* is infectious to humans and causes the disease Cryptosporidiosis. There is no current treatment for Cryptosporidiosis, a disease that causes extreme gastrointestinal illness in healthy persons and poses a risk of death for immuno-compromised individuals. An outbreak of Cryptosporidiosis in 1993 in the City of Milwaukee, attributed to contaminated source water from Lake Michigan, caused more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. All waterborne outbreaks of Cryptosporidiosis detected to date, including the 1993 Milwaukee incident, occurred in communities where water utilities used conventional filtration systems that met all state and federal standards for acceptable water quality.

The U.S. Environmental Protection Agency, in its recent Interim Enhanced Surface Water Treatment Rule ("IESWTR"), 63 Fed. Reg. 69,478 (Dec. 16, 1998), requires water suppliers like the Authority to provide a 2-log (99%) removal of *Cryptosporidium* present in raw water. *Id.* at 69,483, 69,486, 69,516, *codified at* 40 C.F.R. § 141.170(a) (1999). However, because of the dangers presented by *Cryptosporidium* infection in humans, particularly the risk of death to immuno-compromised individuals, the IESWTR establishes a Maximum Contaminant Level Goal of zero for *Cryptosporidium*. 63 Fed. Reg. at 69,484-86, 69,515-16, *codified at* 40 C.F.R. § 141.52(d). The Authority's construction of an offshore intake is necessary to approach the goal of zero *Cryptosporidium* in finished water.

The treatment of highly turbid raw water also generates the production of disinfection byproducts that are known to be animal carcinogens and suspected to be human carcinogens. Using better quality source water both reduces the quantity of such disinfection byproducts in the finished drinking water and provides an additional barrier in the treatment process against waterborne pathogens.

The selection of the best available source water is also a fundamental principal of sanitary engineering that is specifically mandated by regulations of the Virginia Department of Health. 12 Va. Admin. Code § 5-590-820 (1999). The Virginia Commissioner of Health has determined that the Authority's move to an offshore intake is "an essential public health initiative for the more than one million Virginians and their visitors who use FCWA drinking water on a daily basis." (App. K).

2. *The Authority's Permit Applications.*

The Authority submitted its state and federal permit applications on January 4, 1996.

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, prohibits the construction of any structure in the navigable waters of the United States except on plans recommended and approved by the Army Chief of Engineers of the U.S. Army

Corps of Engineers.[4] Section 301 of the Clean Water Act, 33 U.S.C. § 1311, requires a permit issued under Section 404 of that statute if any construction in the waters of the United States might result in a discharge of fill material.[5] Section 401 of the Clean Water Act further requires that the applicant obtain a water quality certification (the "Section 401 Water Quality Certification") from the State in which the discharge originates that the discharge will comply with state water quality standards.[6] The requirement of a Section 401 Water Quality Certification is waived if the State fails or refuses to act within one year after receipt of the applicant's request. *Id.*[7]

In addition to the federal permits, the Authority applied to MDE for three permits from the State of Maryland: a waterway construction permit, an amendment to its water appropriation permit to take water from a different location than the shore, and the Section 401Water Quality Certification required under the Clean Water Act.

Maryland issued the Authority a water appropriation permit in April 1996, authorizing water to be withdrawn from the proposed offshore location; no change was sought or made in the amount of water authorized to be withdrawn. On January 31, 1997, the Corps issued Section 10 and Section 401 permits to the Authority, finding that the proposed construction was "of minimal environmental consequence." (App. H). With these federal permits in hand, the Authority awaited action by MDE on the Maryland waterway construction permit and the Section 401 Water Quality Certification.

3. *Maryland Delays and Obstructs the Authority's Permit Application.*

After its application had been pending for more than a year, the Authority's offshore intake project became politically

4. 33 U.S.C. § 403; 33 C.F.R. § 320.2(b) (1998); 33 C.F.R. § 322.3(a) (1998).

5. 33 U.S.C. §§ 1311, 1344; 33 C.F.R. § 323.3(a) (1998).

6. 33 U.S.C. § 1341(a)(1). 33 C.F.R. § 320.3(a) (1998).

7. 33 U.S.C. § 1341(a)(1).

controversial. Various Maryland state legislators objected to the project and began to pressure MDE to withhold the permits.

For instance, on May 19, 1997, Maryland General Assembly Delegate Jean Cryor (Montgomery County) urged Maryland's Secretary of Environment, Jane T. Nishida, to withhold the Authority's permits, complaining that the Potomac River was "being used as a resource for Virginia's continuing economic development." (App. J). Delegate Cryor's efforts caused MDE to hold a public information hearing. At that hearing in Montgomery County, Maryland on May 21, 1997, Delegate Cryor vowed publicly that she would work to prevent the Authority's offshore intake from ever being constructed. (Bill of Complaint, ¶ 32). State Senator Jean W. Roesser (Montgomery County) likewise opposed the project and stated at the hearing that "we should call a spade a spade" and "have a clear understanding that this expanded intake accommodates Virginia's massive growth." (*Id.*).

On October 21, 1997, while the Authority's Maryland application was pending, a letter to the editor appeared in *The Fairfax Journal* from one Montgomery County, Maryland constituent, stating:

> Fairfax County residents don't know it, but Maryland has just cut your water off. Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Rosser, and P.J. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.

J. Webb, "Maryland Water Belongs There," *The Fairfax Journal* (Oct. 21, 1997). Following substantial political pressure from these and other Maryland state legislators, as well as from the Governor of Maryland himself, MDE's Water Management Administration ("WMA") announced its denial of the

Authority's waterway construction permit in December 1997, and refused to act on the Authority's request for a Section 401 Water Quality Certification. (App. L). WMA claimed that the Authority's offshore intake project was "unneeded" because the Authority already had a shoreline water intake providing "a safe and adequate supply of drinking water." (*Id.*). Upon information and belief, this was the first time that MDE ever denied any waterway construction permit to any applicant for any construction in the Potomac River.

Although the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits, the present Governor claimed, in a February 1998 letter to one of his constituents, that he had decided that the permit should be denied. (App. M). Similarly, Delegate Cryor has claimed publicly on her Internet website that her efforts were instrumental in causing MDE to withhold the Authority's Maryland permits. (Bill of Complaint, ¶ 35).

Since December 1997, the Authority has been enmeshed in convoluted administrative proceedings before the MDE with no final resolution in sight. To contest MDE's actions under Maryland law, the Authority had to submit to a "contested case hearing" procedure before an Administrative Law Judge ("ALJ") from the Maryland Office of Administrative Hearings. Under this procedure, the ALJ makes proposed findings of fact and conclusions of law to MDE, but those findings are not binding on the agency. A "Final Decision Maker," appointed in this case by MDE Secretary Nishida, then makes the ultimate determination for MDE whether to issue the permit. Thus, the same agency that withheld the Authority's permit application in the first place is directed to make the "final decision."

MDE stipulated during the contested case hearing process that the Authority's proposed offshore intake will not harm any aesthetic or boating interests and that it will not interfere with Potomac River fisheries. (App. N). MDE also stipulated that its power to withhold the Section 401 Water Quality Certification

required under the Clean Water Act was waived because of Maryland's delay in acting on the Authority's application. (App. O). MDE has conceded that the offshore intake will, in fact, save the Authority significant expense associated with solids-handling costs. Nonetheless, MDE continues to withhold the waterway construction permit, maintaining that the offshore intake is "unneeded" by Virginia because the Authority is already withdrawing and treating an adequate quantity of water from its shoreline intake to supply Virginia users. MDE also contends that, instead of the Authority's constructing the offshore intake, the Commonwealth of Virginia should take steps to eliminate the sources of sediment that impair water quality at the shoreline, even though water quality along the Maryland shore at the WSSC's water intake is demonstrably worse than on the Virginia side.

The Maryland ALJ precluded the Authority during the contested case hearing process from introducing any evidence to show that MDE's permit decision was the result of improper political influence. Nonetheless, in January 1999, after the close of MDE's case-in-chief, the ALJ ruled that the Authority's waterway construction permit should be issued. Without ruling on the Authority's compact arguments, the ALJ found that MDE was unable to demonstrate that construction of the Authority's proposed offshore intake would have any significant environmental impact.

MDE's "Final Decision Maker" in June 1999 rejected the ALJ's determination and remanded the case for additional hearings. (App. P). MDE's Final Decision Maker directed the ALJ to hear evidence as to whether the Authority "needs" the offshore intake structure. (*Id.* at 142a, 155a-157a, 166a, 168a). Like the ALJ, the Final Decision Maker declined to rule on the Authority's compact argument that Maryland did not have the right to determine for Virginia whether the offshore intake was necessary. (*Id.* at 144a). The contested case hearing was reconvened in November 1999, and the ALJ has taken the case under advisement.

Throughout the contested case hearing process, which started in December 1997, various Maryland State legislators have continued to pressure MDE to withhold the Authority's waterway construction permit, even if the ALJ ultimately recommends that the permit be issued.

On February 3, 2000, Delegate Cryor, with 30 co-sponsors, introduced legislation in the Maryland General Assembly that would effectively prohibit the construction of new water intake structures in the Potomac River until unnamed "studies" are completed at some indeterminate time in the future. (App. U, House Bill 395, Md. House of Delegates introduced Feb. 3, 2000). A companion bill has been introduced in the Maryland Senate. (App. V, Senate Bill 729, Md. Senate, introduced Feb. 4, 2000). In addition to its interim prohibitions, Delegate Cryor's proposed bill would forever prohibit the construction of any new water intake in the Potomac River unless it is a replacement for an existing water intake, thereby effectively preventing *any* additional water intake structures from being constructed by Virginia, its political subdivisions or its citizens. Delegate Cryor specifically intends her bill to prohibit the Authority's offshore intake, and the conditions set forth in her bill are tailored to accomplish that purpose, while purporting to be facially neutral. The companion Senate Bill would likewise delay indefinitely any action on the Authority's permit application. Although it purports to allow a permit to be issued pending the completion of various studies at some indefinite time in the future, the bill is intended and tailored to force the Authority to reduce drastically the capacity of its proposed offshore intake structure. Both the House and the Senate versions of the bill would prevent MDE from issuing the Authority's waterway construction permit.

Although most bills in the Maryland General Assembly, if enacted, become effective October 1 of the same year, both of these bills have an early effective date of June 1, 2000. This early effective date is intended to preempt the contested case

hearing before MDE in which the Authority is presently engaged so as to ensure that the Authority's permit application is delayed or denied. Similar legislation passed both houses of the Maryland General Assembly in 1999 but failed to become law only because the two houses were unable to resolve small differences in their respective bills in the minutes before the legislative session ended at midnight on April 12, 1999.

4. *Maryland Rebuffs Virginia's Efforts to Resolve the Matter and the Maryland Attorney General Claims that the Compacts are Inapplicable to the Non-Tidal Portion of the Potomac River.*

The Authority, since 1997, has made numerous settlement proposals to MDE to secure issuance of a waterway construction permit. (*E.g.*, App. Q, Letter of 9/23/99 from F. Morin to J. Nishida)). MDE has not identified any basis upon which it would agree to issue the permit. (App. R, Letter of 10/29/99 from J.L. Hearn to F. Morin).

On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or concur that permit approval was not required under the interstate compacts between Maryland and Virginia. (App. S). On January 4, 2000, the Attorney General of Maryland responded, contending that the highest court of Maryland had already determined that Virginia's compact rights were inapplicable to the non-tidal reach of the Potomac River, and that, even if they were, Maryland would still have the right to regulate the use of the River by Virginia. (App. T).

The Attorney General of Virginia subsequently conferred in person and by telephone with the Maryland Attorney General prior to filing this action, and was informed that Maryland would not change its position. All reasonable efforts to resolve this dispute informally have been exhausted.

5. *Maryland's Delay is Causing Irreparable Injury to Virginia and her Citizens.*

The Authority's permit application to construct the offshore intake has been pending with MDE for more than four years. No decision in Virginia's favor is reasonably foreseeable. The delay has cost the Authority and its Virginia customers, including the Commonwealth of Virginia, several hundred thousand dollars per year in unnecessary solids treatment costs which can never be recovered. The delay has also exposed and continues to expose Virginia water users to the serious risk of interrupted water supply, disinfection byproducts and waterborne pathogens that elude current treatment capabilities.

REASONS THE COURT SHOULD TAKE JURISDICTION

This Potomac River access case involves a dispute between Virginia and Maryland over the interpretation of two interstate compacts concerning the Potomac River and of a binding arbitration award addressed to Virginia's and Maryland's access to the River — the Compact of 1785, the Potomac River Compact of 1958, and the Black-Jenkins Award of 1877. For more than four years Maryland has refused to grant Virginia a permit to build a new intake in the waters of the Potomac. Virginia asks the Court to determine under the above compacts and arbitration award: 1) whether Maryland may require Virginia, its governmental subdivisions and its citizens to obtain waterway construction and appropriation permits before building improvements from the Virginia shore to obtain access to the waters of the Potomac River; and 2) whether Maryland can require Virginia to demonstrate to Maryland's satisfaction that Virginia has a "need" to construct the improvement or to withdraw water. Having previously exercised its original jurisdiction to resolve disputes between Maryland and Virginia concerning the Potomac River, the Court is uniquely equipped to exercise its original jurisdiction here to interpret relevant interstate compact and arbitration award provisions.

This case is not susceptible to expeditious resolution in Maryland administrative agency proceedings or in the Maryland courts. Anyone building a structure in the Maryland waters of the Potomac is obligated under Maryland statutes to obtain a construction permit from the Maryland Department of the Environment. More than four years ago, the Fairfax County Water Authority, in good faith and as a matter of comity, applied to MDE for that permit, believing that the permit would be readily granted. Instead, the Authority and Virginia have been subjected to inordinate delay premised, most recently, on Maryland's insistence that Virginia demonstrate that it has a "need" for the new water intake.

There is no authority in the relevant compacts and arbitration award for Maryland's position that Virginia must show that its citizens "need" the new water intake. Yet, based on Maryland's past performance, there is every prospect that, in large part for political reasons, Maryland will continue to delay for years and ultimately deny Virginia its permit, and that the Maryland courts will uphold that determination. Thus, there is no alternative forum that can provide a fair and prompt resolution of this case.

There are serious public health issues that militate against further delay and require this Court's intervention. The Authority's present water intake on the Virginia shore provides drinking water to more than 1.2 million people in Virginia. Water drawn through the present intake is adversely affected after local rainstorms and is difficult and expensive to treat. It contains elevated levels of disinfection byproduct precursors and a greater risk of waterborne pathogens that can elude current treatment capabilities. The present intake also becomes clogged with grass, leaves and ice that impair the operation of the system. Virginia has determined that the new intake, which would be safely submerged offshore, will significantly ameliorate these problems, and is an essential public health initiative.

Maryland's latest insistence that Virginia prove to Maryland's satisfaction that Virginia has a need for the new

water intake presents a direct challenge to Virginia's sovereignty. This case involves an interstate controversy concerning the authority of one state, Maryland, to intrude in a determination made by another state, Virginia, concerning what is needed for the health and welfare of Virginia's citizens. Accordingly, the case is particularly appropriate for exercise of this Court's original jurisdiction.

ARGUMENT

The Court has set forth two considerations in determining whether to exercise its original jurisdiction under Art. III, § 2, and 28 U.S.C. § 1251(a):

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to "the nature of the interest of the complaining State," [*Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)], focusing on the "seriousness and dignity of the claim," [*Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)]. . . . Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992). Although each of these factors is discussed in greater detail below, it should be noted at the outset that the Court has rarely declined to exercise its original jurisdiction in cases that, like this one, involve disputes concerning the interpretation of an interstate compact or competing rights to the use of an interstate stream. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact.") (citations omitted).

I. The Seriousness and Dignity of Virginia's Claims Warrant Exercise of This Court's Original Jurisdiction.

A dispute concerning access to and use of interstate waters, and the interpretation of an interstate compact, is the classic case warranting this Court's exercise of its exclusive, original

jurisdiction. In *Oklahoma v. New Mexico*, 501 U.S. 221 (1991), the Court recognized its " 'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Id.* at 241 (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). This case involves not only a dispute concerning the waters of an interstate river, but also a violation by Maryland of its interstate compact obligations with respect to that river. It is noteworthy that this Court has previously exercised its original jurisdiction to resolve disputes between Maryland and Virginia concerning the Potomac River. *Virginia v. Maryland*, 355 U.S. 269 (1957). The Potomac River Compact of 1958, whose language is also at issue here, resulted from the settlement of that case.

Maryland is violating its obligations to Virginia in two material ways. First, Maryland is obstructing Virginia's right to construct improvements appurtenant to the Virginia shore of the Potomac River that are necessary to the full enjoyment of Virginia's riparian rights, and essential to the public health of Virginia citizens, in clear violation of Article VII of the Compact of 1785, the Fourth Clause of the Black-Jenkins Award of 1877, and Article VII of the Potomac River Compact of 1958. Maryland's effort to second-guess whether the Authority or the people of Virginia "need" the offshore intake goes beyond any legitimate claim that Maryland has under these interstate agreements to see that Virginia's use of the River does not obstruct navigation, harm fisheries, or otherwise interfere with Maryland's use of the River.[8]

8. Although it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action. *See Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) (holding that the State of Colorado had a substantial interest in the outcome of Colorado's original action against New Mexico to apportion the Vermejo River, notwithstanding that only one private company in Colorado sought to divert water from the River, because "other Colorado citizens may jointly use the water or purchase water rights in the future. In any

(Cont'd)

Second, Maryland's appointment of itself to control through the permit appropriation process the quantity of water that Virginia can withdraw from the Potomac River violates the fundamental principal recognized in this Court's equitable apportionment cases, that "two States come to the Court on equal footing. Neither is entitled to any special priority over the other with respect to use of the water. . . . Each state through which rivers pass has a right to the benefit of the water. . . . " *Colorado v. New Mexico*, 459 U.S. 176, 191 (1982) (Burger, C.J., concurring) (citation omitted); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Indeed, under this Court's equitable apportionment doctrine, Maryland may not seek to prevent or enjoin the diversion of Potomac River water by Virginia unless Maryland can show that such diversion "will cause it 'real or substantial injury or damage.' " *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 672 (1931)).[9]

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event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State."); *see also United States v. Nevada*, 412 U.S. 534, 539 (1973) ("For the purposes of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the nonfederal users in its own State insofar as the share allocated to the other State is concerned."). In this case, the Authority provides water to 1.2 million people in Virginia. Other Virginia governmental subdivisions draw water from the Potomac, such as the Town of Leesburg, or may do so in the future, such as Loudoun County. The Commonwealth of Virginia also purchases water from the Authority. Importantly, the interstate compacts at issue were between Virginia and Maryland, not between the Authority and Maryland.

9. "This rule applies even if the State seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit." *Colorado v. New Mexico*, 459 U.S. at 187 n.13. Proof that the diversion will cause injury or damage must be by "clear and convincing evidence." *Id.* at 187; *Idaho ex rel. Evans v. Washington*, 462 U.S. 1017, 1027 (1983).

Maryland's attempt to impose a water appropriation permitting requirement on Virginia violates these principles and constitutes a direct affront to Virginia's sovereignty. The LFAA, a properly enacted compact between Virginia, Maryland, the District of Columbia, the United States and the three principal water utilities, already governs the equitable apportionment of Potomac River water in times of low flow. Maryland's efforts to control further the means or manner of withdrawal of water by Virginia is tantamount to the power to deny access to the River itself. Maryland may no more limit or regulate Virginia's withdrawals from the River than Virginia can limit or regulate Maryland's withdrawals. Such action would clearly be a " 'casus belli if the States were fully sovereign.' " *Mississippi v. Louisiana*, 506 U.S. at 77 (*quoting Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)).

II. Virginia Has No Adequate Alternative Forum.

This Court has exclusive subject matter jurisdiction over suits between two States. 28 U.S.C. § 1251(a). There is no adequate alternative forum to resolve the Compact issues presented here.

A. The Pending Maryland Administrative Proceeding Is an Inadequate Forum in Which to Resolve Whether Maryland's Waterway Construction Permitting System Violates Virginia's Compact Rights.

The Maryland administrative proceeding is not competent to determine Virginia's rights. This Court is the only forum situated to pass fairly upon the proper interpretation of the interstate compacts and arbitration awards between Maryland and Virginia. As the Court stated in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951):

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To

> determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation.

Id. at 28 (citation omitted).

Maryland has done precisely what this passage forbids. Its courts and its Attorney General have determined unilaterally that Virginia's interstate compact rights in the Potomac River do not apply upstream of the tidal reach. (App. T). Maryland's Governor has personally intervened in the administrative permitting process to cause MDE to deny the Authority's permit application, without regard to Virginia's compact rights. (App. M). And Maryland state legislators, who have vowed to prevent the Authority from ever constructing its offshore intake, have introduced legislation in the Maryland General Assembly to accomplish that very goal. (App. U, V).

The pending administrative proceeding in Maryland (to which the Authority, but not the Commonwealth, is a party), is illegitimate and inadequate to determine Virginia's rights for four reasons. First, neither Virginia nor its governmental subdivisions should have to submit to a Maryland administrative proceeding to exercise their interstate compact rights to use the Potomac River, or to build improvements appurtenant to the shore. Maryland violates its interstate compact obligations by seeking to determine whether Virginia or its governmental subdivisions "need" to construct improvements along the Virginia shore, and by having its courts and administrative agencies assume jurisdiction to decide such questions. The putative "alternative forum" is inadequate because it is illegitimate.

Second, it would be futile to require that Virginia, through the Authority, litigate the scope of Virginia's interstate compact rights in a Maryland tribunal. That tribunal has failed to rule upon or even consider the Authority's compact arguments. More importantly, Maryland's Attorney General insists that

Maryland's highest court has *already* ruled that Virginia's compact rights in the Potomac River do not apply above the tidal reach. (App. T). Thus, the result of submitting the compact issue to Maryland's legal system has been pre-determined by Maryland.

In *Middlekauff v. LeCompte*, 132 A. 48 (Md. 1926), the Maryland Court of Appeals ruled that Maryland legislation concerning fish pots in the Upper Potomac was effective without concurrent legislation from Virginia under Article VIII of the Compact of 1785. Adopting Chancellor Bland's reasoning in *Binney's Case*, 2 Bland 99, 126 (1829), the Maryland high court held that the Compact of 1785 applied only to the navigable portion of the Potomac River in the tidal reach. 132 A. at 50.[10]

10. *Middlekauff* was wrongly decided for three reasons. First, it ignored this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), that West Virginia and its citizens were entitled as successors-in-interest to Virginia to rights under Article VII of the Compact of 1785. *Id.* at 580-81, 585. This holding clearly established that the Compact applies above the tidal portion of the Potomac River. The Court of Appeals in *Middlekauff* in 1926 failed to cite or mention the Supreme Court's ruling from 1910.

Second, clause four of the Black-Jenkins Award of 1877, which established the boundary between Maryland and Virginia beginning at the line separating Virginia from West Virginia, specifically recognized Virginia's right to the use of the River beyond the low-water mark on the Virginia shore as may be necessary to the full enjoyment of her riparian rights. App. D, Act of March 3, 1879, ch. 196, 20 Stat. 481, 482.

Finally, the underlying opinion of Chancellor Bland in *Binney's Case*, upon which the Court in *Middlekauff* relied, was rejected by the Black-Jenkins arbitrators in 1877. In their opinion accompanying the award, they stated: "We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction *(Chancellor Bland notwithstanding)* that it applies *to the whole course of the river above the Great Falls as well as below*." App. C, Board of Arbitrators to Adjust the Boundary Line Between Maryland and Virginia: Opinions and Award of Arbitrators on the Maryland and Virginia Boundary Line at 16 (M'Gill & Witherow 1877) (emphasis added).

Because Maryland's highest court and its Attorney General have ignored Virginia's compact rights in the non-tidal reach of the Potomac, it would be futile to require that Virginia or its governmental subdivisions submit to lengthy administrative proceedings and subsequent judicial appeals. The result of that exercise has been pre-ordained.

Third, requiring Virginia to submit the determination of its compact claims (by proxy through the Authority) to a Maryland administrative agency or Maryland state courts is inconsistent with one of the central purposes of this Court's original jurisdiction: "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (citing *Chisholm v. Georgia*, 2 Dall. 419, 475-476 (1793); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888)).[11] Given the positions taken to date by MDE, the Maryland Governor, the Maryland General Assembly, and the Maryland Court of Appeals, it is clear that parochial factors have already led to the reality, not to mention the appearance, of partiality to Maryland in this dispute.

Finally, where there is an ongoing injury to the State that seeks to invoke this Court's original jurisdiction, as in this case, it is not appropriate to defer to a pending proceeding in another forum. *Compare Arizona v. New Mexico*, 425 U.S. 794 (1976)

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11. The Court found that this concern did not apply in *Ohio v. Wyandotte Chemicals Corp.*, in which the State of Ohio sought to enjoin corporations in Michigan, Delaware and Canada from further polluting Lake Erie, because Ohio was free to pursue the same action in the courts of its own state, and Ohio courts could exercise personal jurisdiction over the defendants. 401 U.S. at 500. In this case, by contrast, the putative alternative forum to which Virginia would be relegated is a Maryland state administrative proceeding. Such a forum is particularly unacceptable when the dispute focuses on Virginia's rights as against Maryland's under their interstate compacts. "A State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28.

(finding no ongoing injury to Arizona and declining original jurisdiction), *with Maryland v. Louisiana*, 451 U.S. 725 (1981) (finding ongoing injury to Maryland and other plaintiff states and granting leave to file the complaint). This is not a case like *Arizona v. New Mexico*, where Arizona was denied leave to file a complaint against New Mexico challenging the discriminatory impact of its energy tax. The three Arizona utilities affected by the tax were seeking a declaratory judgment in New Mexico state court that the tax was unconstitutional but, in the meantime, they chose not to pay it. 425 U.S. at 796. This Court later explained in *Maryland v. Louisiana* that the lack of an actual injury to Arizona was what justified declining original jurisdiction in that case in favor of the pending state lawsuit:

> It is also important to note that Arizona had itself not suffered any direct harm as of the time that it moved for leave to file a complaint since none of the utilities had yet paid the tax. Unlike the present case, it was highly uncertain whether Arizona's interest as a purchaser of electricity had been adversely affected.

451 U.S. at 743. In *Maryland v. Louisiana*, by contrast, the Court held that the challenge by eight states to Louisiana's "first use" tax on natural gas was appropriate for the Court's original jurisdiction because Louisiana, unlike New Mexico, required the tax to be paid pending a refund action, and limited the interest rate applicable should any refund be awarded. *Id.* at 743.

Similar to the plaintiff states in *Maryland v. Louisiana*, and unlike Arizona in *Arizona v. New Mexico*, Virginia is suffering actual, ongoing injury from Maryland's delay in issuing the Authority its waterway construction permit. The four-year delay in Maryland's Byzantine administrative process has already cost the Authority and its Virginia customers, including the Commonwealth of Virginia, hundreds of thousands of dollars a year in unnecessary solids treatment expenses that can never be recovered. Maryland's delay has also exposed the 1.2 million people in Virginia who consume Potomac River water to

increased health risks associated with highly turbid raw water drawn from the shoreline. Virginia should not have to wait for Maryland to decide whether a proposed public health project is "needed" in Virginia, particularly where, as here, Maryland does not contend that the construction would harm fishing or navigation, or otherwise interfere with the use of the River by Maryland. Maryland's four-year delay is long enough.

B. The Pending Maryland Administrative Proceeding Will Not Resolve Whether Maryland's Water Appropriation Permitting System Violates Virginia's Compact Rights.

The Authority was issued a water appropriation permit by Maryland in April 1996 and the validity of Maryland's water appropriation permitting system as applied to Virginia's use of the Potomac River is not at issue in the pending administrative proceeding. Thus, that proceeding is not an alternative forum to resolve Virginia's claim that Maryland's water appropriation permitting system violates Virginia's interstate compact rights.

Even though Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River, Maryland insists that Virginia and its governmental subdivisions — including the Authority and the Town of Leesburg — apply for water appropriation permits before taking any water from the River. Maryland's permitting process can be very time consuming and dilatory. For instance, MDE took approximately one year to act on the most recent request by the Town of Leesburg, Virginia, for an increase in its water appropriation permit from 5 to 10 million gallons a day.

The fact that Maryland has not yet denied a water appropriation permit to a Virginia user does not obviate the need for this Court to decide whether Maryland has the power to regulate Virginia's water withdrawals. The failure or refusal to apply for a water appropriation permit from Maryland exposes Virginia's state and local officials and citizens to potential criminal prosecution in Maryland state courts. Md. Code Ann., Envir. § 5-514 (1996). This court should permit Virginia to challenge Maryland's illegal efforts to regulate Virginia's water

withdrawals from the Potomac River, lest Maryland one day argue that its continuing efforts to subject Virginia to its permitting regime have ripened into a de facto amendment to the compacts formally executed between these two sovereigns. Maryland should not be permitted to infringe Virginia's right to use the Potomac River simply because Maryland has, to date, condescended to issue water appropriation permits to Virginia users.

CONCLUSION

The Court should grant Virginia's motion for leave to file the Complaint and refer this case to a special master, consistent with its procedures for original action cases. The Commonwealth of Virginia further requests that the Court:

1. Declare that Virginia's right to use the Potomac River and to construct improvements appurtenant to the shore applies upstream of the tidal reach of the Potomac River, as established by Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958;

2. Declare that Maryland may not require that Virginia, its governmental subdivisions, or its citizens obtain a Maryland waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River;

3. Enjoin Maryland from requiring the Fairfax County Water Authority to obtain a waterway construction permit for its proposed offshore intake project;

4. Enjoin Maryland from requiring Virginia, its political subdivisions, or its citizens to obtain water appropriation permits to withdraw water from the Potomac River; and

5. Award Virginia such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

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February 18, 2000

BILL OF COMPLAINT

No. __, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

BILL OF COMPLAINT

The Commonwealth of Virginia, by its Attorney General, Mark L. Earley, brings suit against the State of Maryland, and in support of its cause of action states as follows:

1. The Commonwealth of Virginia and more than 1.2 million of its people are suffering present irreparable harm from the actions of the State of Maryland in violation of interstate compacts and in violation of the rights of Virginia and her citizens to fair use of the waters of the Potomac River.

2. The filing of this Complaint has been authorized by the Governor of Virginia.

3. Virginia brings this action against Maryland in Virginia's own right as a party to the Black-Jenkins Award of 1877, the Potomac River Compact of 1958, Article VII of the Compact of 1785, and the Potomac River Low Flow Allocation Agreement (the "LFAA"). The LFAA, dated January 11, 1978, was made by the United States of America, Virginia, Maryland, the District of Columbia, the Fairfax County Water Authority, and the Washington Suburban Sanitary Commission. Virginia also brings this action as *parens patriae* on behalf of more than 1.2 million consumers in Virginia who receive water drawn from the Potomac River for drinking, fire protection and other uses, from the Fairfax County Water Authority and the Town of Leesburg, as well as on behalf of all other Virginia citizens and residents who may receive Potomac River water from these or other Virginia political subdivisions or water purveyors in the future. Virginia also brings this action in her own right as a direct consumer of Potomac River water in more than 100 locations in the counties of Fairfax, Prince William and Loudoun, and the cities of Fairfax and Alexandria.

4. This Court has exclusive, original jurisdiction of this action under Art. III, § 2, cl. 2 of the Constitution of the United States, and 28 U.S.C. § 1251.

History of Interstate Compacts and Agreements Between Virginia and Maryland Concerning the Potomac River

5. The Potomac River (the "Potomac" or "River") is an interstate river. The River rises in Virginia, West Virginia,

Maryland, the District of Columbia and Pennsylvania. Approximately thirty-six per cent of the area of the Potomac River watershed above its tidal reach lies in Virginia, and substantially more of the water in the River originates from drainage areas in Virginia than from sources in any other State in the watershed. The River provides a source of drinking water to more than 3.5 million people in the Washington metropolitan area.

6. From just below Harper's Ferry, West Virginia, where the main stem of the Potomac and the Shenandoah River converge, to Smith's Point, Virginia, where the Potomac enters the Chesapeake Bay, the mean low water mark on the south bank of the Potomac is the boundary line between Virginia and Maryland, as established by the Black-Jenkins Award of 1877, and consented to by Congress in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481, 482. (App. D).

7. Since Colonial times, disputes have arisen periodically between Virginia and Maryland regarding each State's respective rights to the Potomac River.

8. Commissioners appointed by Virginia and Maryland met in March 1785 and agreed upon thirteen articles. The resulting Compact of 1785 was subsequently approved by the legislatures of both States. (App. A). Article VII of the Compact provided:

> The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the

> navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states. Provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other. . . .

9. The Compact of 1785 did not determine the boundary between the States. In 1874, Virginia and Maryland mutually authorized the submission to binding arbitration of the issue of the true boundary line between them. The arbitrators' award, known as the Black-Jenkins Award, established the boundary line at the low-water mark on the Virginia shore of the Potomac. However, the Fourth Clause of the award provided as follows:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Both states ratified the Award and Congress consented to it in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481, 482. (App. D).

10. In 1957, Maryland sought unilaterally to abrogate the Compact of 1785 and to exercise jurisdiction in the tidal

portions of the Potomac River without concurrence from Virginia. Virginia responded by filing an original action against Maryland in this Court. This Court granted Virginia's motion for leave to file the complaint. *Virginia v. Maryland*, 355 U.S. 269 (1957). The Court appointed retired Mr. Justice Stanley Reed as special master. 355 U.S. 946 (1958). The two States resolved their disputes by agreeing to the Potomac River Compact of 1958 (App. E), which was subsequently consented to by Congress. Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962). Article VII, section 1 of the new Compact expressly affirmed the rights of Virginians to the use of the River that had been protected by Article VII of the Compact of 1785, including the right to build wharves and improvements into the River from the Virginia shore.

Cooperation Among the States and the Washington Metropolitan Area's Water Suppliers

11. From 1958 until the events that gave rise to the present dispute, Virginia and Maryland enjoyed a period of cooperation concerning the use of the Potomac River. The three major water suppliers to the Washington metropolitan area are the Washington Aqueduct Division of the U.S. Army Corps of Engineers (the "Aqueduct"), the Washington Suburban Sanitary Commission ("WSSC"), a governmental subdivision of the State of Maryland, and the Fairfax County Water Authority (the "Authority"), a governmental subdivision of the Commonwealth of Virginia. The WSSC supplies Montgomery County and Prince George's County, Maryland, with treated water drawn from the Potomac River and the Patuxent Reservoir. The Aqueduct provides treated water drawn from the Potomac River for the District of Columbia and portions of northern Virginia, including

Arlington County, the City of Falls Church and eastern Fairfax County. The Authority provides treated water for most of the remainder of northern Virginia, about one-half being drawn from the Potomac River and the balance from the Occoquan River Reservoir in southern Fairfax County.

12. In 1978, Virginia and Maryland signed the LFAA (App. F) as a necessary first step, required by 42 U.S.C. § 1962d-11a, to the investment of large sums of money by the Authority and the WSSC to build facilities to withdraw and treat water from the Potomac River to serve fast-growing populations on both sides of the River. In the LFAA (App. F), Maryland acknowledged that Virginia and "communities located in Virginia" have riparian rights in the River. The LFAA allocates the flow in the River among the "users" of the River at times when the flow is inadequate to supply the full needs of all of the users. The "users" expressly include "the Commonwealth [of Virginia] for and on behalf of herself and each of her political subdivisions and authorities (including the Authority.)" Portions of the LFAA, as amended in July 1982 and executed by the Governors of both participating States and the Mayor of the District of Columbia, are premised upon the existence of a legally enforceable agreement between the Authority, WSSC and the Aqueduct "for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area."

13. Contemporaneously with the 1982 amendments to the LFAA, the Aqueduct, the WSSC, the District of Columbia, the Authority, and the Interstate Commission on the Potomac River Basin Section for Cooperative Water Supply Operations in the Potomac ("Co-Op"), entered into a Water Supply Coordination Agreement. (App. G). The Agreement,

administered by the Co-Op, is designed to ensure a sufficient water supply for the Washington metropolitan area in the future. During periods of low flow in the River, the Co-Op coordinates the utilities' withdrawals from the River so as to minimize the need to invoke any restrictions on withdrawals under the LFAA. The parties also agreed to periodically project the future water demands for the Washington metropolitan area, and the WSSC, the Authority and the District of Columbia agreed to share the costs of construction, operation and maintenance of additional water supplies that might be needed to avoid water shortages in the future. The Co-Op and the water utilities are presently engaged in a water demand study for the year 2020.

14. In 1982, concurrently with the execution of the Water Supply Coordination Agreement, the Aqueduct, the WSSC, the Authority and the District of Columbia also entered into a series of other cost-sharing agreements to provide storage capacity in upstream reservoirs in Maryland and West Virginia, in order to supplement the supply of water for the Potomac River in times of low flow. To date, Virginia customers of the Authority, including the Commonwealth of Virginia, have contributed under the various cost-sharing agreements in excess of $7 million to the capital, operating and maintenance costs of those upstream reservoirs. Water stored in the reservoirs was used for the first time during the summer drought of 1999 to supplement the flow of the Potomac River, avoiding the need for any restrictions on water withdrawals pursuant to the LFAA. The coordinated operation of the region's water resources will enable the utilities to meet the area's demands, without imposing restrictions, through at least the year 2015, even under repeated recurrences of the historic drought of record. The system of cooperation between the water suppliers in the Washington metropolitan area has served as a model for the Nation.

The Present Controversy

15. Maryland requires that any person seeking to construct an improvement in the Potomac River obtain a waterway construction permit from the Maryland Department of Environment ("MDE"). Md. Code Ann., Envir. §§ 5-504, 5-507 (1996); Md. Regs. Code tit. 26, § 26.17.04 (1999). Maryland also requires that any person seeking to withdraw water from the Potomac River obtain a water appropriation permit from MDE. Md. Code Ann., Envir. § 5-502 (1996); Md. Regs. Code tit. 26, § 26.17.06.03 (1999). MDE purports to retain the authority to deny a permit application if it determines in its sole discretion that a waterway construction project, or water appropriation request, is "unnecessary." A violation of the Maryland permitting statutes or regulations constitutes a misdemeanor, subject to a fine up to $500 per day for each day of the offense, not to exceed a total fine of $25,000. Md. Code Ann., Envir. § 5-514 (1996).

Maryland's Waterway Construction Permitting Process is Invalid as Applied to Virginia

16. Maryland's waterway construction permit procedure is invalid as applied to Virginia. Under its compacts with Maryland and pursuant to the Black-Jenkins Award, Virginia, her governmental subdivisions and her citizens have the right to the full use of the Potomac River beyond the low-water mark on the Virginia shore, including the privilege of erecting wharves and other improvements, as long as such use does not impair navigation, harm fisheries, or otherwise interfere with the use of the River by Maryland.

17. As set forth below, an actual controversy exists between Virginia and Maryland with respect to the rights of

Virginia and her riparian communities to construct improvements appurtenant to the Virginia shore of the Potomac River.

Virginia's Need for an Offshore Drinking Water Intake

18. The Fairfax County Water Authority provides drinking water to approximately 1.2 million people in Northern Virginia, including many of the people who live and/or work in Fairfax County, Loudoun County, Prince William County, the City of Alexandria, Dulles Airport, Fort Belvoir and the Lorton Reformatory.

19. The Authority presently withdraws water from the Potomac River at a site along the Virginia shoreline in Loudoun County, Virginia. The existing shoreline intake is clogged from time to time by grass, leaves, and ice. In addition, following local rainstorms, when the River is influenced by runoff from several upstream tributaries, water withdrawn at the shoreline is more difficult to treat than water in the main channel due to high turbidity (a measurement of the amount of particulate matter suspended in the water), and low pH and alkalinity. The substantial quantities of solids that must be removed from the water at the treatment plant and trucked off-site also cause a considerable expense.

20. A comprehensive study of the Authority's operations by an outside engineering firm concluded that the Authority should construct an alternative intake 725 feet offshore from the existing intake, in the main channel of the River. The Potomac River is 2000 feet wide at that point. Offshore intakes to supplement shoreline intakes are common across the country. The study determined that an alternative,

offshore intake would reduce, if not eliminate, the Authority's operational problems due to clogging at the shore intake, reduce solids loading at the treatment plant by 40% to 50%, and dramatically improve the quality of the raw water. The present value associated with the reduction in solids disposal and chemical treatment costs alone exceeds $13 million. This economic value would inure to the benefit of the Authority and its customers, including the Commonwealth herself.

21. The Authority's proposed offshore intake would also provide significant public health benefits to Virginia. The Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms. Mean turbidity at the shore is 50% greater than in the channel of the river. When local rainfall exceeds 1/2 inch, mean and median turbidity and suspended solids at the Authority's shore intake are more than four times greater than in the channel of the river, where turbidity and suspended solids levels change very little. These conditions significantly interfere with the smooth operation of the water treatment plant and greatly increase the risk of human error in producing finished drinking water free of contaminants. The WSSC's water intake on the Maryland shore, just downstream from Watt's Branch, experiences even poorer water quality from local runoff in Maryland. Mean turbidity at the WSSC's shore intake is more than 30% greater than at the Authority's shore intake.

22. Although the Authority currently produces finished drinking water that complies with all federal and state water quality standards, high turbidity in raw water following local rainstorms is associated with elevated levels of waterborne pathogens, including *Cryptosporidium* and *Giardia*. The

species *Cryptosporidium parvum* is infectious to humans and causes the disease Cryptosporidiosis. There is no current treatment for Cryptosporidiosis, a disease that causes extreme gastrointestinal illness in healthy persons and poses a risk of death for immuno-compromised individuals. An outbreak of Cryptosporidiosis in 1993 in the City of Milwaukee, attributed to contaminated source water from Lake Michigan, caused more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. All waterborne outbreaks of Cryptosporidiosis detected to date, including the 1993 Milwaukee incident, occurred in communities where water utilities used conventional filtration systems that met all state and federal standards for acceptable water quality. The Authority's construction of an offshore intake is necessary to approach the Maximum Contaminant Level Goal of zero for *Cryptosporidium* that was set by the Environmental Protection Agency in its Interim Enhanced Surface Water Treatment Rule, 63 Fed. Reg. 69,478, 69,484-85 (Dec. 16, 1998), *codified at* 40 C.F.R. § 141.52(5) (1999).

23. The disinfection of highly turbid raw water during the water treatment process also generates the production of disinfection byproducts that are known to be animal carcinogens and suspected to be human carcinogens.

24. Using better quality source water both reduces the quantity of such disinfection byproducts in the finished drinking water and provides an additional barrier in the treatment process against waterborne pathogens.

25. Virginia Health Department regulations require the Authority to select the cleanest possible source water. 12 Va. Admin. Code § 5-590-820 (1999). The Virginia

Commissioner of Health has specifically found that the construction of the offshore intake is an essential public health measure for the more than 1.2 million people in Virginia who receive drinking water from the Authority. (App. K).

Maryland Obstructs, Delays and Withholds the Authority's Waterway Construction Permit

26. On January 4, 1996, the Authority applied for all necessary federal and state permits to construct the offshore intake. The Authority applied for federal permits to the United States Army Corps of Engineers, pursuant to § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act, 33 U.S.C. § 1344. Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), further required that the Authority, as a condition of obtaining its federal permits, also obtain a water quality certification from the State of Maryland that the construction would not result in a discharge that would violate Maryland water quality standards (the "Section 401 Water Quality Certification").

27. The Authority applied for three permits from the State of Maryland through MDE: a waterway construction permit, an amendment to the Authority's water appropriation permit to take water from a different location than the shore, and the Section 401 Water Quality Certification.

28. The Authority's water appropriation permit amendment was granted by the Water Management Administration of MDE in April 1996, authorizing withdrawal of water from the proposed offshore location.

29. MDE delayed approving either the waterway construction permit or the Section 401 Water Quality Certification.

30. The Army Corps of Engineers granted the necessary federal permits on January 31, 1997, finding that the Authority's offshore intake project posed "minimal environmental consequence." (App. H).

31. Nonetheless, MDE continued to delay acting on the Authority's remaining permit requests. After the Authority's application had been pending with MDE for more than a year, the offshore intake project became politically controversial. Various Maryland state legislators objected to the Authority's offshore intake project and began to pressure MDE to withhold and deny the permits.

32. For instance, on May 19, 1997, Maryland General Assembly Delegate Jean Cryor (Montgomery County) urged Maryland's Secretary of Environment, Jane T. Nishida, to withhold the Authority's permits, complaining that the Potomac River was "being used as a resource for Virginia's continuing economic development." (App. J). Delegate Cryor's efforts caused MDE to hold a public information hearing. At that hearing on May 21, 1997, Delegate Cryor vowed publicly that she would work to prevent the Authority's offshore intake from ever being constructed. State Senator Jean W. Roesser (Montgomery County) likewise opposed the project and stated at the hearing that "we should call a spade a spade" and "have a clear understanding that this expanded intake accommodates Virginia's massive growth."

33. On October 21, 1997, before MDE had announced its decision on the Authority's permit application, a letter to

the editor appeared in *The Fairfax Journal* from one Montgomery County, Maryland constituent, stating:

> Fairfax County residents don't know it, but Maryland has just cut your water off. Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Rosser, and P.J. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.

J. Webb, "Maryland Water Belongs There," *The Fairfax Journal* (Oct. 21, 1997).

34. In fact, following substantial political pressure from these and other Maryland state legislators, as well as from the Governor of Maryland himself, MDE's Water Management Administration ("WMA") announced its denial of the Authority's waterway construction permit on December 10, 1997, and refused to act on the Authority's request for a Section 401 Water Quality Certification. (App. L). WMA claimed that the Authority did not "need" the offshore intake project because it already had a water intake along the Virginia shoreline. Upon information and belief, this was the first time that MDE had ever denied a waterway construction permit to any applicant for any construction in the Potomac River.

35. Although the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits, the present Governor took credit for

causing the permit to be denied in a February 1998 letter to one of his constituents. (App. M). Similarly, Delegate Cryor has claimed publicly on her Internet website that her efforts were instrumental in causing MDE to withhold the Authority's Maryland permits.

36. Since December 1997, the Authority has been enmeshed in convoluted administrative proceedings before the MDE with no final resolution in sight. To contest MDE's actions under Maryland law, the Authority had to submit to a "contested case hearing" procedure before an Administrative Law Judge ("ALJ") from the Maryland Office of Administrative Hearings. Under this procedure, the ALJ makes proposed findings of fact and conclusions of law to MDE, but those findings are not binding on the agency. A "Final Decision Maker" appointed by Secretary Nishida, the Secretary of MDE, makes the ultimate determination for MDE as to whether the permit will issue. Thus, the same agency that withheld the Authority's permits in the first place is directed to make the "final decision" whether to issue the permit.

37. MDE has stipulated during the contested case hearing process that the Authority's proposed offshore intake will not harm any aesthetic or boating interests, and that it will not interfere with Potomac River fisheries. (App. N). MDE has conceded that the Project will save the Authority significant expense associated with solids-handling costs. MDE has also stipulated that Maryland waived its ability to withhold the Section 401 Water Quality Certification because, pursuant to 33 U.S.C. § 1341, Maryland failed to act for more than a year on the Authority's application. (App. O). Nonetheless, MDE continues to withhold the waterway construction permit, maintaining that the offshore intake is "unneeded" by Virginia because the Authority is

already withdrawing and treating an adequate quantity of water from its shoreline intake to supply Virginia users. MDE further contends that, instead of the Authority's constructing the offshore intake, the Commonwealth of Virginia should take steps to eliminate the sources of sediment that impair water quality at the shoreline, even though water quality along the Maryland shoreline at the WSSC's water intake is demonstrably worse than on the Virginia side.

38. The Maryland ALJ has precluded the Authority during the contested case hearing process from introducing any evidence to show that MDE's permit decision was the result of improper political influence. Nonetheless, in January 1999, after the close of MDE's case-in-chief, the ALJ ruled that the Authority's waterway construction permit should be issued. Without ruling on the Authority's compact arguments, the ALJ found that MDE was unable to demonstrate that construction of the Authority's proposed offshore intake would have any significant environmental impact.

39. MDE's "Final Decision Maker" in June 1999 rejected the ALJ's determination and remanded the case for additional hearings. (App. P). MDE's Final Decision Maker directed the ALJ to hear evidence as to whether the Authority "needs" the offshore intake structure. Like the ALJ, the Final Decision Maker refused to rule on the Authority's compact arguments that Maryland did not have the right to determine for Virginia whether the offshore intake was necessary. The contested case hearing was reconvened in November 1999, and the ALJ has taken the case under advisement.

40. Throughout the contested case hearing process, various Maryland State legislators have continued to exert

pressure and influence on MDE to withhold the Authority's waterway construction permit, even if the ALJ ultimately recommends to MDE that the permit be issued.

41. On February 3, 2000, Delegate Cryor introduced legislation in the Maryland General Assembly with 30 co-sponsors that would prohibit the construction of new water intake structures in the Potomac River until unnamed "studies" are completed at some indeterminate time in the future. (App. U, House Bill 395, Md. House of Delegates, introduced February 3, 2000). A companion bill has been introduced in the Maryland Senate. (App. V, Senate Bill 729, Md. Senate, introduced February 4, 2000). Delegate Cryor's proposed bill would forever prohibit the construction of any new intake in the Potomac River unless it is a replacement for an existing water intake, thereby effectively preventing *any* new water intake structures from being constructed by Virginia, its political subdivisions or its citizens. Delegate Cryor specifically intends her bill to prohibit the Authority's offshore intake, and the conditions set forth in her bill are tailored to accomplish that purpose, while purporting to be facially neutral. The companion Senate Bill would likewise delay indefinitely any action on the Authority's permit application. Although it purports to allow a permit to be issued pending the completion of various studies at some indefinite time in the future, the bill is intended and tailored to force the Authority to reduce drastically the capacity of its proposed offshore intake structure. Both the House and the Senate versions of the bill would prohibit MDE from issuing the Authority's waterway construction permit.

42. Although most bills in the Maryland General Assembly, if enacted, become effective October 1 of the same year, both of these bills have an early effective date of

June 1, 2000. This early effective date is intended to preempt the contested case hearing before MDE in which the Authority is presently engaged so as to ensure that the Authority's permit application is delayed or denied. Similar legislation passed both houses of the Maryland General Assembly in 1999 but failed to become law only because the two houses were unable to resolve small differences in their respective bills in the minutes before the legislative session ended at midnight on April 12, 1999.

43. The Authority's application to construct the offshore intake has been pending with MDE for more than four years. The delay has cost the Authority and its Virginia customers, including the Commonwealth of Virginia, hundreds of thousands of dollars per year in unnecessary solids treatment costs, which can never be recovered. The delay has also exposed and continues to expose Virginia water users to the risk of interrupted water supply, elevated levels of disinfection byproducts, and waterborne pathogens that elude current treatment capabilities.

44. On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or concur that permit approval was not required under the interstate compacts between Maryland and Virginia. (App. S). On January 4, 2000, the Attorney General of Maryland responded, contending that the highest court of Maryland had already determined that Virginia's compact rights were inapplicable to the non-tidal reach of the Potomac River, and that, even if they were applicable, Maryland would still have the right to regulate Virginia's use of the River. (App. T). The Attorney General of Virginia subsequently conferred with the Maryland Attorney General, both in person and by

telephone, prior to filing this action, and was informed that Maryland would not change its position. All reasonable efforts to resolve this dispute by negotiation or agreement have been exhausted.

Maryland's Water Appropriation Permitting Process is Invalid as Applied to Virginia

45. An existing case and controversy also exists with respect to the validity of Maryland's water appropriation permitting system as applied to Virginia. Even though Maryland has not, to date, denied any Virginia user a permit to appropriate water from the Potomac River, Maryland purports to require that Virginia and its governmental subdivisions, including the Authority and the Town of Leesburg, apply for water appropriation permits before withdrawing any such water. The permitting process can be very time consuming and is subject to delay and undue influence by Maryland politicians opposed to water withdrawals by Virginia. MDE's Water Management Administration took approximately one year to act on the most recent request by the Town of Leesburg, Virginia, for an increase in its water appropriation permit from 5 million gallons per day ("MGD") to 10 MGD.

46. Maryland's water appropriation permit procedure is invalid as applied to Virginia. Maryland has no unilateral right to determine how much water Virginia and her riparian communities may withdraw from the River. Maryland does not own the water in the River. Virginia's right to withdraw water from the Potomac River is governed by the LFAA, the Fourth Clause of the Black-Jenkins Award, Article VII, Section 1 of the Potomac River Compact of 1958, Article VII of the Compact of 1785, and federal common law principles of equitable apportionment.

47. The failure or refusal of Virginia, its political subdivisions or its citizens to apply for a waterway construction permit or water appropriation permit from Maryland exposes Virginia's state and local officials and citizens to potential criminal prosecution in Maryland state courts.

48. Maryland's state permitting laws violate Maryland's interstate compact obligations, infringe upon Virginia's sovereignty, and impede and interfere with Virginia's rights of access to the Potomac River.

PRAYER FOR RELIEF

WHEREFORE, the Commonwealth of Virginia prays that the Court:

1. Declare that Virginia's right to use the Potomac River and to construct improvements appurtenant to the Virginia shore applies upstream of the tidal reach of the Potomac River, as established by Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958;

2. Declare that Maryland may not require that Virginia, its governmental subdivisions, or its citizens obtain a Maryland waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River;

3. Enjoin Maryland from requiring the Authority to obtain a waterway construction permit for its proposed offshore intake project;

4. Enjoin Maryland from requiring Virginia, its political subdivisions, or its citizens to obtain water appropriation permits to withdraw water from the Potomac River; and

5. Award Virginia such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

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February 18, 2000

No. 129, Original

FILED
FEB 18 2000
CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

APPENDIX

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APPENDIX A — COMPACT OF 1785
(1786 Md. Laws c. 1)

At a SESSION of the GENERAL ASSEMBLY of MARYLAND, begun and held at the CITY of ANNAPOLIS, on Monday, the 7th of November, in the year of our Lord 1785, and ended the 12th day of March, 1786, the following laws were enacted,

WILLIAM SMALLWOOD, ESQUIRE, GOVERNOR.

CHAP. I.

An ACT to approve, confirm and ratify, the compact made by the commissioners appointed by the general assembly of the commonwealth of Virginia, and the commissioners appointed by this state, to regulate and settle the jurisdiction and navigation of Patowmack and Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia. Lib. TBH. No. A. vol. 584.

WHEREAS, at a meeting of the commissioners appointed by the general assemblies of the commonwealth of Virginia, and the state of Maryland, for forming a compact between the two states, to regulate and settle the jurisdiction and navigation of Patowmack, Pocomoke rivers, and that part of Chesapeake bay which lieth within the territory of Virginia, to wit: George Mason and Alexander Henderson, Esquires, on the part of the commonwealth of Virginia, and Daniel of Saint Thomas Jenifer, Thomas Stone and Samuel Chase, Esquires; on the part of the state of Maryland, at

Appendix A

Mount Vernon, in Virginia, on the twenty-eighth day of March, in the year one thousand, seven hundred and eighty-five, the following compact was mutually agreed to by the said commissioners. First, The commonwealth of Virginia disclaims all right to impose any toll; duty or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be for ever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of its citizens, or carrying on commerce to or from the said state, or with any of its citizens, and that any such vessel, inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also that the before-mentioned parts of Chesapeake and Pocomoke river be free for the navigation of vessels from one port of the state of Maryland to another. Second, The state of Maryland agrees, that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said Commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty, or any other charge. Third, Vessels of war, the property of either state, shall not be subject to the payment of any port duty, or other charge. Fourth, Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and

having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges. Fifth, All merchant vessels (except such as are described in the fourth article) navigating the river Patowmack, shall enter and clear at some naval-office on the said river in one or both states, according to the laws of the state in which the entry shall be made; and where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state, only in proportion to the commodities carried to or taken from such state. Sixth, The river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland. Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seanes on the shores of the other. Eighth, All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and navigation thereof, or of the

river Pocomoke within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states. Ninth, Light-houses, beacons, buoys or other necessary signals, shall be erected, fixed and maintained, upon Chesapeake bay, between the sea and the mouths of the rivers Patowmack and Pocomoke, and upon the river Patowmack, at expense of both states; if upon Patowmack river, at the joint and equal charge of both states, and if upon the before-mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts, of such expense, and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode and plans, for erecting and fixing light-houses, buoys, beacons, and other signals, as aforesaid, both states shall, upon the application of either to the other, appoint an equal number of commissioners, not less than three or more than five from each state, to meet at such times and places as the said commissioners, or a major part of them, shall judge fit, to fix upon the proper places, mode and plans, for erecting and fixing such light-houses, beacons, or other signals, and report the same, with an estimate of the expense, to the legislatures of both states, for their approbation. Tenth, All piracies, crimes or offences, committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Patowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful, and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two states upon the said river is doubtful, by any persons not citizens of the

commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offences. And all piracies, crimes and offences, committed on the before-mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offences. All piracies, crimes and offences, committed on the said parts of Chesapeake bay, and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences. And all piracies, crimes and offences, committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Patowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river in every respect, except in the case of piracies, crimes and offences, committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought; and if the inhabitants of either state shall commit any violence, injury or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate, of the state where the offense shall have been committed, having jurisdiction thereof, may enter the

appearance of such person, and proceed to trial and judgment in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of offender, both in the state where the offender shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment properly authenticated being produced to any court of magistrate of the state where such offender may reside, having jurisdiction within the state or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment, in the same manner and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited. Eleventh, Any vessel entering in any port on the river Patowmack, may be libelled or attached for debt by process from the state in which such vessel entered; and if the commercial regulations of either state shall be violated by any person carrying on commerce in Patowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized by process from the state whose laws are offended, in order for trial; and if any person shall fly from justice in a civil or criminal case, or shall attempt to defraud creditors, by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers upon any person, or property of any person, not a

citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury having been by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court or magistrate having jurisdiction, being served by a proper officer of the county where such citizen shall reside. Twelfth, The citizens of either state having lands in the other, shall have full liberty to transport to their own state the produce of such lands, or to remove their effects, free from any duty, tax or charge whatsoever, for the liberty to remove such produce or effects. Thirteenth, These articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed or altered by either without the consent of the other; And whereas this general assembly are of opinion, that the said compact is made on just and mutual principles, for the true interest of both governments, and if executed with good faith, will perpetuate harmony, friendship and good offices, between the two states, so essential to the prosperity and happiness of their people;

II. BE IT ENACTED, *by the General Assembly of Maryland*, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the commonwealth of Virginia, thereupon, and

immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this state and the citizens thereof, and shall be for ever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this state is hereby solemnly pledged and engaged to the general assembly of the commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by this legislature of this government, without the consent of the government of Virginia.

APPENDIX B — 1874 Md. Acts c. 247, DESIGNATING ARBITRATORS TO ASCERTAIN AND FIX THE BOUNDARY BETWEEN THE STATES OF VIRGINIA AND MARYLAND

AN ACT to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland.

WHEREAS, a controversy exists as to the true line of the boundary between the States of Virginia and Maryland; and,

WHEREAS, the State of Virginia, by an act of its General Assembly, entitled an act to designate the arbitrators to ascertain and fix the boundary between the States of Maryland and Virginia, approved on the twenty-eighth day of March, in the year of our Lord, one thousand eight hundred and seventy-four, has declared its willingness to submit the said controversy to arbitration, and to accept as final and conclusive, such award as may be made in the premises; therefore —

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between the said States of Virginia and Maryland, and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe;

and the State of Maryland hereby pledges its faith to accept and abide by the award of said arbitrators in the premises as final and conclusive; provided, however, that neither of the States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said States and the citizens thereof, forever.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake Bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States; and the Governor is hereby requested to forward a copy of this act to the Governor of Virginia.

SEC. 3. *And be it enacted*, That this act shall be in force from its passage.

Approved, April 11th, 1874.

APPENDIX C — OPINION OF ARBITRATORS — 1877 OPINION REGARDING BOUNDARY LINE BETWEEN VIRGINIA AND MARYLAND

The undersigned are requested by the States of Virginia and Maryland to ascertain and determine the true line of boundary between them. Having consented to do this in the capacity of arbitrators, we are about to make our award.

To examine the voluminous evidence, historical, documentary, and oral; to hear with due attention the able and elaborate arguments of counsel on both sides, and to confer fully on the merits and demerits of this ancient controversy, required all the time we bestowed on it.

The death of Governor Graham in the midst of our labors was a great loss to the whole country; but to us it was a special misfortune, for it deprived us suddenly of the industry, the talent, the wise judgment, and the scrupulous integrity upon which we had relied so much. Though these high qualities were fully supplied by his distinguished successor, the vacancy occurring when it did, set back our proceedings nearly to the place of beginning and caused a delay of almost a year.

Our first intention was to make a naked award, without any statement of the grounds upon which it rested; but after more reflection it seemed that the weight of the cause, the dignity of the parties, and the wide differences of opinion, grown inveterate by centuries of hostile discussion, made some explanation of our judgment desirable, if not necessary.

The *charter* of Charles I to Cecilius, Baron of Baltimore, dated June 20th, 1632, gave to the grantee dominion over

the territories described in it, and made him Governor of the colony afterwards planted there, with succession to his heirs at law. These rights, proprietory as well as political, became vested in the State of Maryland at the Revolution. Inasmuch as that State claims *under* the charter, she must claim *according* to it.

Virginia, by her first Constitution, as a free State (June 29th, 1776) disclaimed all rights of property, jurisdiction, and government over territories contained within the charters of Maryland and other adjoining colonies. The force of this solemn acknowledgment is not, in our opinion, diminished by the dissatisfaction which Maryland, as well as other States of the Confederation, afterwards expressed with Virginia's claim to a Northern and Western border, including all lands ceded by France to Great Britain at the pacification of 1763.

Insasmuch as both of the States are bound by the King's charter to Lord Baltimore, and both confess it to be the only original measure of their territory, it becomes a point of the first importance to ascertain what boundaries were assigned to Maryland by that instrument. By what lines was the colony of Maryland divided from those other possessions of the British Crown to which Virginia afterwards succeeded as a result of her independence?

The original patent delivered to Lord Baltimore by the King is irrecoverably lost, and it is denied — at least it is not admitted — that we have an accurate copy. It was registered in the High Court of Chancery when it passed the seal, and an attested transcript from the Rolls Office is produced. It is written in the law Latin of the period to which

it belongs, and many of the words are abbreviated. Another copy nearly, if not exactly, like that from the Rolls, was deposited in the Colonial Office, and thence removed to the British Museum. The latter copy was changed long subsequent to the date of the charter by a person who added some words, and extended others by interlining omitted terminations. This is alleged to have been done for the purpose of making it correspond with the original, which, according to the same allegation, was borrowed from a member of the Calvert family for that purpose. We reject this whole story as apocryphal. The interlineations were unauthorized except by the judgment of the person who wrote them that he was supplying elipses or giving in full the true words meant by the contracted orthography. We are obliged to believe that the patent was enrolled with perfect accuracy. The conclusive presumption of law is that the high and responsible officers charged with that duty did see it performed with all due fidelity. No doubt of this can justly be raised upon the fact that abbreviated words are found in the registry. Why should not these be in the original? Nay, why should we expect them not to be there? That mode of writing was the universal custom of the time. It was used in all legal papers and records as long as the law spoke Latin. A deed in which these abbreviations occurred was not thereby vitiated. What was the harm of writing A.D. for *anno domini*, fi. fa. for *fieri facias*, or ca. sa. for *capias ad satisfaciendum*? *Hered. et assignat.* was as good as *heredibus et assignatus suis*, if all legists understood that one as well as the other was a limitation of the fee to heirs and assigns. Adjectives and substantives without terminations to indicate gender, number, or case did not lose their meaning, and the omission of the concluding syllable might be some advantage to a

conveyancer who was rusty in his syntax. This habit of contracting words, pervades, not only the deeds, but the criminal pleadings of that time. A public accuser, doubtful if the offense he was prosecuting violated two acts of Parliament or only one, charged it as *contra formam statut.*, and read the last word *statuti* or *statutorum*, as the state of the case might require. The defendant's averment of his innocence was recorded as a plea of *non cul.* When the Attorney General reasserted the guilt of the accused and declared his readiness to prove it, he took one Latin and one Norman-French word, truncated them both, and said — *cul. prit.* Even the last and most tragical part of the record in a capital case, the judge's order to hang the prisoner by the neck, was curtly, but very intelligibly written — *sus. per col.*

We are satisfied that the office copy is true; that it is exactly like the original; and that the use of abbreviated words does not impair the validity of the instrument. Moreover, that part of the charter which defines the boundaries of the province speaks, not equivocally, but in terms so clear and apt that the intent is readily perceived. It remains to be seen whether we can apply the description to the subject-matter by laying the lines on the ground. To that end it is necessary to ascertain how the geography of the country was understood by the King and Lord Baltimore at the time when the charter was made.

In the great litigation between Penn and Lord Baltimore, a bill drawn up by Mr. Murray, (afterwards Lord Mansfield,) or by some equity pleader under his immediate direction, avers in substance that Charles I and the ministers whom he

consulted on Lord Baltimore's application had the map of Capt. John Smith before them when the boundaries of the colony were agreed on. This was neither denied nor admitted in the answer of the defendant, who, being third in descent from the applicant, had no personal knowledge about it. But we take the fact to be certainly true, not only because we have the assertion of it by Penn and his very eminent counsel, but because it is well known that Smith's map was the only delineation then extant of that region, and his History of Virginia, to which the map was prefixed, had been before, and continued for a long time afterwards, to be the only source of information concerning its geography. Besides, a comparison of the map with the charter will show by the similarity of names, spelling, &c., that one must have been taken from the other.

The editions of Smith's History, published by himself in 1612 and 1629, have been produced, with the map thereto prefixed. Besides, we have one printed in 1819 by authority of Virginia from the same plate used by Smith himself two hundred years before, and found, by a curious accident, in a promiscuous heap of old metal which had been imported from England to some town in Pennsylvania.

With the charter in one hand and the map in the other it may seem an easy task to run these lines. But there are difficulties still. The map, though a marvellous production, considering how and when it was made, is not perfectly correct. Smith could not see and measure everything for himself, nor always depend upon the observations of others. With his defective instruments he could not get the latitude and longitude truly. He laid down some points and places in

the wrong relation to each other, and some not unimportant to us he left out altogether. There are inaccuracies here and there in the configuration of a coast, the shape of an island, or the course of a river. Unfortunately the style of his *History* is so confused and obscure that it throws no light on the dark parts of the map. As a writer he had great ambition and small capacity. He could give some interest to a narrative of his own adventures, but any kind of description was too much for his powers. There is another trouble: scarcely any of the places marked on Smith's map are now popularly known by the names he gave them. Not only the names, but the places themselves have been much changed. Considerable islands are believed to have been washed away or divided by the force of the waters. Headlands which stretched far out into the bay have disappeared, and the shore is deeply indented where in former times the water line was straight, or curved in the other direction. Add to this a certain amount of human perversity with which the subject was handled in colonial days, and it is not surprising that representatives of the two States have, with the most upright intentions, failed to agree in their views of it. We are to reach, if possible, the truth and very right of the case.

The boundaries of Maryland are described in the charter as beginning at Watkins' Point and running due east to the sea, up the shore of the ocean and the Delaware Bay, to the fortieth degree of latitude; thence westward along that degree to the longitude of the headwater of the Potomac; thence southward to that river, and by it, or one of its banks, to Cinquack on the Chesapeake, and from Cinquack straight across the Bay to the place of beginning. With the eastern and western borders we have nothing to do. Our interest in

the description of the Maryland line begins at the northwest angle, where her territory becomes contiguous to that of Virginia.

That line, on the western side, has been run and marked along its whole course, and at both termini, in a way which commands the acquiescence of both States. No question is raised here about the location of it. But it is necessary to look somewhat narrowly into the call for it which the charter makes, because that may influence our judgment on the lines which run from the head of the river to the sea, every inch of which is contested.

The State of Virginia, through her Commissioners and other public authorities, adhered for many years to her claim for a boundary on the left bank of the Potomac. But the gentlemen who represent her before us expressed with great candor their own opinion that a true interpretation of the King's concession would divide the river between the States by a line running in the middle of it. This latter view they urged upon us with all proper earnestness, and it was opposed with equal zeal by the counsel for Maryland, who contended that the whole river was within the limits of the grant to Lord Baltimore.

When a river is called for as a boundary between two adjacent territories, (whether private property or public domains,) the line runs along the middle thread of the water. A concession of lands *to* a stream does not stop at one bank or cross over to the other, but finds its limit mid-way between them. But a river may be included or excluded, if the parties choose to have it so. If the intent is expressed that the line

shall be upon one bank or another, the mere force of construction cannot put it anywhere else. The natural interpretation is the legal and proper one.

This is too obviously just to need the support of authority. But it was well illustrated by the Supreme Court of the United States, in the case of Ingersoll *v.* Howard, (13 How., 381.) Alabama claimed to the middle of the Chatahoochee by virtue of a boundary described in a concession from Georgia thus: "Beginning *on the western bank* of the Chatahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river and *along the western bank* thereof," &c. The court held that these words established the line of boundary upon the western bank. There is some resemblance between that case and the one under consideration.

The northern boundary of Maryland is by the charter to run westward to the true meridian of the first fountain of the Potomac. That point being ascertained, it shall turn at right angles and run towards (literally against) the south — "*vergendo versus meridiem*" — where? "*ad ulterioram predicti fluminis ripam*" — to the further bank of the aforesaid river. Approaching the river from the north, the further bank is the south bank of course. The description proceeds, without a pause, thus: "*et eam sequendo qua plaga occidentalis ad meridionalem spectat usque ad locum quendam appellatum* Cinquack." Now, the words "*eam sequendo*" are a direction that something shall be followed in running the line between the point already fixed on the south bank of the Potomac, where it rises in the mountain and Cinquack, which is on the same side of the river, near to

its mouth. What shall we follow? Clearly *eam ripam* and clearly not *id flumen*, if we take the grammatical sense of the phrase. Another consideration impresses us a good deal. Lawyers in the reign of Charles I wrote Latin in the idiom of the vernacular tongue. We would naturally expect to see the thought of these parties expressed by words arranged in the English order, thus: *ad ulterioram ripam predicti fluminis et sequendo eam*. The other and more classical collocation was not adopted for its euphony, but for the sake of precision. It brought *ripam* and *eam* into close juxtaposition, and made the antecession so immediate that it could not be mistaken. The interjected phrase, "*qua plaga occidentalis ad meridionalem spectat*," has had its share of the minute verbal criticism bestowed upon the whole document; but we see nothing in it except an attempt (perhaps not very successful) to describe the aspect of the Western Shore, where it turns to the south. Certainly there is nothing there which requires the line to leave the river bank. Apart from all this, it looks utterly improbable that the two *termini* of this line should both have been fixed on the south side of the river without a purpose to put the line itself on the same side. The intent of the charter is manifest all through to include the whole river within Lord Baltimore's grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*.

For these reasons we conclude that the charter line was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth and "*usque ad locum quendam appellatum Cinquack*."

Appendix C

Where is the place called Cinquack? It must have had a certain degree of importance in Smith's time as a landing place, a village, or the residence of some aboriginal chief. But there is now no visible vestige of it. Even its name has perished from the memory of living men. Nevertheless, the place where it once was can be easily found. The charter describes it as "*prope fluminis ostium*" — near the mouth of the river; and Smith has marked it on his map about six miles south of the place where the river joins the bay. This point was no doubt chosen as the terminus of the long river line, because it was the only place near the mouth of the Potomac, on that side, to which Smith's map gave a name; and it furnishes one among many circumstantial proofs that no other map was consulted in drafting the charter. Having found this corner, it becomes our duty to trace the lines which lead us thence over the bay and across the eastern shore to the sea.

From Cinquack to the ocean the charter gives only two lines. One, starting at Cinquack, goes straight to Watkins' Point, the other runs from Watkins' Point due east to the sea shore. There will be no possible mistake about these lines if we can but find out the precise situation of Watkins' Point.

This point being the commencement and closing place of the boundary is twice named, and once its locality is given with reference to other objects. It is described as lying "*juxta sinum predictum prope flumen de Wighco*;" that is to say, on (or close to) the aforesaid bay (the Chesapeake) and near the river Wighco. Looking at Smith's map we find a cape extending southwestwardly from the mainland of the eastern shore. This cape is called Watkins' Point by Smith himself on his map, and he has marked the waters on one side

Chesapeack Bay, and on the other *Wighco flumen*. Turning to the modern maps, and especially to those of the Coast Survey, where everything is measured with fractional accuracy, we find the same point of land laid down, not quite in the same latitute nor delineated with exactly the same shape, but bordered by the same waters, and with no variance which makes its identity at all doubtful. It is at present the extreme southwestern point of Somerset county in Maryland at Cedar Straits, *juxta* the Chesapeake and *prope* the Pocomoke, which is now the name for Wighco. Being the Watkins' Point of Smith's map, it is the Watkins' Point of the charter.

This conclusion appears to be inevitable from the premises stated; but it does not receive universal assent. We must therefore notice the principal grounds on which its correctness is impugned.

In the first place, the fundamental fact is denied that Smith by his own map affixed the name of *Watkins' Point* to the headland in question. In other words, it is alleged, that though the point is laid down and the name written in proximity to it, the one does not apply to the other. Let the map speak for itself. An inspection of it will show that all the names of such points are written in the same way. Nor is there any other point to which it can with reasonable propriety be referred.

The map has been uniformly read as we read it. Lord Baltimore showed how he understood it. In 1635, only three years after the date of his charter, he printed what he called a "Relation of Maryland," and prefixed to it a map on which

Appendix C

Watkins' Point is laid down at Cedar Straits, with the beginning and closing lines of his boundary running from and to it. It is not likely that he could be mistaken, nor is it supposed that he fraudulently misstated the fact, and he was not contradicted by the ministers of the Crown or by anybody interested in the Virginia plantation.

In 1670 Augustin Herrman, the Bohemian, published a map fuller than the previous ones, and there we have Watkins' Point at Cedar Straits very conspicuously marked, and the two lines closing at its southern end. What makes this stronger is that in 1668 the line between the colonies had been marked east of the Pocomoke by Calvert and Scarborough on a latitude considerably higher than an eastern line from Watkins' Point; but Herrman considered Watkins' Point so definitely fixed, and the call for a straight eastern line thence to the ocean so over-ruling, that he assumed the coincidence of the Scarborough line with his own, and so laid it down.

In the map of Peter Jefferson and Joshua Fry, of which a French copy was engraved and printed at Paris in 1755 and a second English edition at London in 1775, dedicated by the publishers to the Lords Commissioners of Trade and Plantations, we find Watkins' Point unmistakably laid down at the mouth of the Pocomoke, with the Scarborough and Calvert line from the sea to the Pocomoke so drawn that a westward extension of it would strike exactly or very nearly that place.

Mr. Thomas Jefferson published his Notes on Virginia in 1787, with a map, on which the strongly-marked boundary

runs to the ocean by an East line from Watkins' Point at Cedar Straits; and he, like Herrman and the others, took it for granted that this, and no other, was the line marked by Scarborough and Calvert.

Mitchell's map (1750-1755) bears similar testimony to the situation of Watkins' Point. So do several others of the last century and many of more recent times.

It is useless to particularize more authorities like these. Let it be enough to say that all geographers for two centuries and a half have understood Smith's map as calling what is now the Southern extremity of Somerset County Watkins' Point; nor is it known otherwise in the general speech of the country. Smith's designation has adhered to it through all changes. If that be not its true name, it never had any name at all.

But the fact rests on stronger proof than that. It is established by the uniform and universal consent of both States and all their people. Maryland steadily claimed it as her actual border, and Virginia never practically denied the claim by taking territory immediately above it. Eastward and Westward, where the lines were invisible, both parties made mistakes. But Watkins' Point or the territory near it was not debatable ground. All men, except perhaps Col. Scarborough, recognized and respected the great landmark when they came within sight of it.

But even that is not all. In 1785 some of the most eminent men of the two States came together at Mount Vernon to arrange the difficulties between them. Standing face to face,

those commissioners concurred in saying that Watkins' Point was the boundary mark to which the line from the Western shore should run; and they described its situation very unequivocally when they spoke of it as "Watkins' Point, near the mouth of the Pocomoke river." Remembering that this compact was drawn up with most conscientious care, agreed to after cautious examination, ratified by the Legislatures of both States, rigidly adhered to by all parties ever since, and still regarded as of such sacred obligation that all power to touch it is withheld from us, we feel ourselves literally unable to fix the Watkins' Point of the charter anywhere else than at the place then referred to as the true one.

It is suggested that the charter could not have meant the point at Cedar Straits, because it is called a *promontory*, which implies high land, whereas this is a dead level, rising but slightly above the waters on either side. That argument is easily disposed of. The map did not indicate whether the land was high or low, and therefore care was taken to employ two alternative terms, of which one would surely fit the case if the other would not. The charter says that the beginning line shall run east to the ocean "*a promontorio* SIVE CAPITE TERRE *vocato* Watkins' Point;" from the promontory *or* headland. The same abundant caution is observed again when the point comes to be mentioned as the terminus of the closing line, which is required to run "*per lineam brevissimam usque ad predictum promontorium* SIVE LOCUM *vocatum* Watkins' Point." Thus the controlling call of the charter is for Watkins' Point, by its given name, whether it be a high promontory or a low headland, or merely a *place* whose character is not properly signified by either word.

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We proceed to another objection. Smith, in his account of the explorations made by himself and others with him, says, in effect, that they landed at divers places mentioned, (among others Watkins' Point,) and at all those places marked trees with crosses, as "a notice to any, Englishmen had been there." Now there are not, and probably never were, trees capable of being so marked on the Watkins' Point which lies at Cedar Straits; therefore it is argued that Watkins' Point is not Watkins' Point. Those who think this deduction legitimate would remove the point in question from the place where Smith puts it on his map, where all geographers have placed it, where the charter describes it to be, and where by the general consent it is, rather than believe that Smith, in his confused way of writing, exaggerated the truth or committed an error about so unimportant a matter as that of marking trees at *all* points where he landed.

It is alleged that another place, higher up the shore and near to the mouth of the Annamessex, is the true Watkins' Point of the charter. There is (or rather there was) a point there of considerable magnitude and some elevation, which has now entirely disappeared. Smith noted it as a triangular extension of the mainland into the bay; in 1665 persons, who had then recently seen it, described it as "a small spiral point," whatever that may mean; and later evidence shows that there was a peach orchard upon it. In a sworn affidavit of Captain Jones, used in 1665 by Virginia, it is referred to as "a small point described on Capt. Smith's map without a name." Why should we suppose this to be the place called for in the charter as Watkins' Point? It was not so nominated on the map, or anywhere else. Smith, so far from ever speaking or writing about it as Watkins' Point, gave it another and a different

name. Dr. Russell, who was with him when he made his explorations, says that it was called Point Ployer, "in honour of that most honorable house of Monsay, in Brittaine, that in an extreme extremity once relieved our Captaine." Can anything be more complete than the failure of this effort to substitute the place *called* Point Ployer for the place *called* Watkins Point?

But it said that Scarborough and Calvert agreed in 1668 that the line from the sea should run to the Annamessex, and not to the Pocomoke. That is not the point of the present question. We are now inquiring where the boundaries were originally fixed. A conventional arrangement of those Commissioners might bind their constituents for the after time, but it could not change the pre-existing facts of the case or make that a false, which before was a true, interpretation of the charter. Nor is any opinion or conclusion expressed or acted upon by them entitled to much consideration as evidence. If Philip Calvert *thought* that the charter limit was at Point Ployer, he was grossly deceived, and Col. Scarborough *knew* very well that it was *not* there, for he had previously declared on his corporal oath that the "small spiral point" near the Annamessex was South of the charter call "about as far as a man could see on a clear day."

Some stress is laid upon another fact. In 1851 the Fashion, a vessel of which John Tyler, a Marylander, was owner and master, was arrested for dredging in Maryland waters. The justice of the peace before whom the proceeding was instituted condemned her, but on appeal to the County Court the judgment was reversed. The record does not show the grounds of the condemnation or the reasons of the

reversal; but Tyler himself deposes from memory that he was finally cleared on the testimony of two old men, who swore to a State line running across Smith's Island about three-quarters of a mile above Horse Hammock, and over the Bay to the mouth of the Annamessex, which would throw the *locus in quo* of the offense within the jurisdiction of Virginia. If we assume that the issue, the evidence, and the legal reasons of the judgment, are correctly reported by an unlearned man a quarter of a century after the trial, the inference is a fair one that the court of Somerset county believed the line to be where the witnesses said it was, and not at Horse Hammock on one side of Tangier Sound, or at Watkins' Point on the other. But are we now bound to accept that evidence as infallibly true? If it were delivered before us in the pending cause by the witnesses themselves, we would take it at its worth. Its probative force is certainly not increased by being fished up from the oblivion of twenty-five years and produced to us at second hand. We do not understand that anybody supposes the judgment itself to be binding as a determination of the subject-matter between the two States. The traditionary line of Tyler's grandfather and old Mr. Lawson must stand or fall by the natural strength of the facts which support and oppose it. Now it is perfectly ascertained that Virginia in 1851 did not pretend to have any claim on Smith's Island above Horse Hammock, nor within the limits of Somerset county on the Bay shore above Watkins' Point. This record of the Fashion case, considered as evidence of a line at Annamessex, is illegal, insufficient, and unsatisfactory, while the proofs which show that in truth the line was at Watkins' Point are irresistible and overwhelming.

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If we are right thus far, it follows that the original line as fixed and agreed by the King and Lord Baltimore runs from Cinquack by a straight line to the extreme south-western part of Somerset county, Maryland, which we find to be the true Watkins' Point of the charter, and thence by a straight line to the Atlantic ocean. These lines will be seen on the accompanying map, marked and shaded in blue.

But this is not the present boundary. How firmly so-ever it may have been fixed originally, a compact could change it, and long occupation inconsistent with the charter is conclusive evidence of a concession which made it lawful.

Usucaption, prescription, or the acquisition of title founded on long possession, uninterrupted and undisputed, is made a rule of property between individuals by the law of nature and the municipal code of every civilized country. It ought to take place between independent States, and according to all authority it does. There is a supreme necessity for applying it to the dealings of nations with one another. Their safety, the tranquility of their peoples, and the general interests of the human race do not allow that their territorial rights should remain uncertain, subject to dispute, and forever ready to occasion bloody wars. (See Vattel, Book II, chap. 11, and Wheaton, Part II, chap. 4, sec. 4, citing Grotius Puffendorf and Rutherforth.) The length of time which creates a right by prescription in a private party raises a presumption in favor of a State, that is to say, twenty years. (Knapp's Rep., 60 to 73.) It is scarcely necessary to add that the exercise of a privilege, the perception of a profit, or the enjoyment of what the common law calls an easement, has the same effect as the possession

of corporeal property. It behooves us, then, to see whether the acts or omissions of these States have or have not materially changed their original rights and modified their boundaries, as described in the charter. We will look first at the Potomac.

The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water-mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved "the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon." By the compact of 1785, Maryland assented to this, and declared that "the citizens of each State respectively shall have full property on the shores of Potomac and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements." We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below. Taking all together, we consider it established that Virginia has a proprietory right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

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To that extent Virginia has shown her rights on the river so clearly as to make them indisputable. Her efforts to show that she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part, have been less successful.

To throw a cloud on the title of Maryland to the South half of the river, the fact is proved that in 1685 the King and Privy Council determined to issue a *Quo Warranto* against the Proprietary of Maryland, "whereby the powers of that charter and the government of that province might be seized into the King's hands" for insisting on "a pretended right to the *whole* river of Potowmack" and for other misdemeanors. This was a formidable threat, considering what a court the King's Bench was at that time; but it never was carried out, and we can infer from it only that the then Lord Baltimore was not in favor with the ministry of James II.

What is called the Hopton grant was confirmed to the Earl of St. Albans and others in 1667 by Charles II. It included all the land between the Rappahanock and the Potomac, *together with the islands within the banks of those rivers and the rivers themselves.* The rights of the original grantees became vested in Lord Fairfax and his heirs, who sold large portions of it, and as to the rest, the Commonwealth first took it be forfeiture and afterwards bought out the Fairfax title from the alienees of his heirs. It is not pretended that this grant could, *proprio vigore*, transfer the title of the Potomac islands from Lord Baltimore to the Earl of St. Albans; but it is argued that, as Lord Baltimore must have known of it, and did not protest or take any measure to have it cancelled, his silence, if not conclusive against him by way of equitable estoppel, was at least an admission that

he did not own the islands or the bed of the river in which they lay. We answer that he had a right to be silent if he chose; his elder and better title, which was a public act, seen and known of all men, spoke for him loudly enough. Besides that, his subsequent possession of the islands was the most emphatic contradiction he could give to any adverse claim, or pretense of claim, under the Hopton grant.

But these conflicting grants of the islands increased the importance of knowing how and by whom they had been occupied. The exclusive possession of Maryland was affirmed and denied upon evidence so uncertain that we thought it right to postpone our determination for several weeks, so as to give time for the collection of proper proofs. When these came forth they showed satisfactorily that Maryland had granted all the islands, taxed the owners, and otherwise exercised proprietary and political dominion over them. Three Virginia grants were produced which purported to be for islands in the Potomac, but on examination of the surveys it appeared that they were not *in*, but *upon*, the river. One is in Nomini Bay, and the other two are called islands only because they lie with one side on the shore, while the other sides are bounded by inland creeks. All are on the Virginia side of the low water-mark, which we have said was the boundary between the States.

It being thus shown that there is nothing to deflect the line from the low-water mark, we are next to see whether its eastern terminus has been changed. That it certainly has. Cinquack was quietly ignored so long ago that no recollection, nor even tradition, exists of any claim by Maryland on the Bay Shore below the Potomac. When the

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Compact of 1785 was made, Smith's Point, precisely at the mouth of the river, on the south side, was assumed by both States to be the starting place of the line across the bay.

Nor does the line now run from Smith's Point, *per lineam brevissimam*, to Watkins' Point. It holds a course far north of that, so as to strike Sassafras Hammock, on the western shore of Smith's Island, and take in Virginia's old possession there. It reaches Watkins' Point, not by the one straight line called for in the charter, but by a broken line, or rather by several lines uniting at angles more or less sharp. Before we explain how this came about it is necessary to observe some facts in the general history of the eastern-shore boundary.

While the situation of Watkins' Point at the mouth of Pocomoke was not doubted, nobody knew where the lines running to and from it would go, or what natural objects they would touch in their course. East and west, wherever the solitary landmark could not be seen, a search for the boundary was mere guess-work, and some of the conjectures were amazingly wild. The people there seem to have had none of that ready perception of courses and distances which an Indian possesses intuitively, and which a pioneer of the present day acquires with so much facility.

Almost immediately after the planting of the Maryland colony, some of its officers claimed jurisdiction on the Eastern Shore, nearly twelve miles south of a true east line from Watkins' Point. Sir John Harvey, then Governor and Captain-General of Virginia, with the advice of the council, conceded the claim, and on the 14th of October, 1638, issued a proclamation, declaring the boundary to be on the

Anancock, and commanding the inhabitants of his colony not to trade with the Indians north of that river. We discredit the allegation that this was a fraudulent collusion between the Governor of Virginia and the agents of the Maryland proprietary. It was a mutual mistake — a very gross one to be sure — and not long persisted in. It serves now only to show how loose were the notions of that time about these lines.

Soon after this (but the time is not ascertained) a similar blunder was made westward of Watkins' Point. This was not a claim by Maryland below the true line, but by Virginia above it. Smith's Island lies out in the Chesapeake Bay, quite north of any possible line called for by the charter. But the relative situation of that island being misapprehended, Virginia took quiet and unopposed possession upon it, and holds a large part of it to this day.

No willful transgression of the charter boundary took place before 1664. Then rose Col. Edmond Scarborough, the King's Surveyor General of Virginia. His remarkable ability and boldness made him a power in Virginia, and gave him great mental ascendency wherever he went. He had no respect for Lord Baltimore's rights, and when he could not find an excuse for invading them, he did not scruple to make one. At the head of forty horsemen, "for pomp and safety," he made an irruption into the territory of Maryland, passing Watkins' Point and penetrating as far as Monoakin, where he arrested the officers of the Proprietory and harried the defenseless people.

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To justify this proceeding he referred to an act of the Grand Assembly of Virginia, (passed without doubt by his influence,) which declares Watkins' Point to be above Manoakin, authorizes the Surveyor General to make publication commanding all persons south of Watkins' Point to render obedience to His Majesty's Government of Virginia, and requiring Col. Scarborough, with Mr. John Catlett and Mr. John Lawrence, or one of them, to meet the Maryland authorities upon due notice, (if they were not fully convinced of their intrusions,) and debate and determine the matter with them. Scarborough did none of these things. His conduct throughout violated the act of the Virginia assembly as grossly as it violated the Maryland charter.

To vindicate the claim for a boundary as high up as Manoakin, he put in his own affidavit and that of seven others that the place described in Capt. Smith's map for Watkins' Point, was not at the Pocomoke nor at the Annamessex, but as far above the small spiral point at the mouth of the latter river as a man could see in a clear day, and that the Pocomoke was never called or known by the name of Wighco. This was sworn to in the very face of the map itself, where Watkins's Point was described as lying on the Pocomoke, and where the Pocomoke was distinctly named the Wighco.

In June, 1664, Charles Calvert, Lieutenant Governor of Maryland, sent Philip, the Chancellor, on a special mission to Sir William Berkeley, then Governor of Virginia, to demand justice upon Scarborough for entering the Province of Maryland in a hostile manner, for outraging the inhabitants of Annamessex and Manoakin by blows and imprisonment, for attempting to mark a boundary thirty miles north of

Watkins' Point, and for publishing a proclamation at Manoakin wholly unauthorized. Col. Scarborough was too great a man to be punished, but his acts were repudiated, the claim for his spurious boundary was disavowed, Watkins' Point was again fully acknowledged to be where it always had been, and so the land had rest for a season.

But the quiet time did not last long. The very next year we find Colonel Scarborough on the east side of the Pocomoke, north of the boundary, cutting out a large body of Lord Baltimore's' land, and dividing it by surveys to himself and his friends. The necessity was manifest for having the true line traced and marked on the ground between Watkins' Point and the sea. To do this Colonel Scarborough was appointed a commissioner on one side, and Philip Calvert on the other. But, instead of closing the controversy as their respective constituents intended, their work was done so imperfectly that it has been a principal cause of error and misunderstanding ever since.

Their instructions, as recited by themselves, required them to "meet upon the place called Watkins' Point." That they did meet there does not appear, but they say that, "after a full and perfect view of the point of land made by the north side of Pocomoke Bay and the south side of Annamessex, we have and do conclude the same to be Watkins' Point, from which *said point, so called,* we have run an east line, agreeable with the extremest part of the western angle of said Watkins' Point, over the Pocomoke river, to the land near Robert Holston's, and there have marked certain trees which are continued by an east line to the sea," &c.; and they agreed that this should be received as the bounds of the

two provinces "on the eastern shore of the Chesapeake Bay." Whosoever shall try to get at the sense of this document, will find himself "perplexed in the extreme." What was it that they concluded to be Watkins' Point? Not the whole body of the territory between the Annamessex and the Pocomoke. Nobody understands it in that way. Not Point Ployer; for they both knew, and one of them swore, it was not there. Did they actually run any line west of the Pocomoke? If yes, they must have known with perfect certainty where the true line would cross the river; and in that case, what was the necessity for founding a mere conclusion about it upon the lay of the land between the two bays? If it was then ascertained by actual demonstration with the compass that a western extension of the marked line would strike Watkins' Point, why does it not strike that point now, instead of terminating, where it does, far above, at the Annamessex? Again, why was it not marked? Why was it never recognized, acknowledged, or claimed by either party afterwards? Our rendering may seem a strain upon the words, but we infer from the paper and the known facts of the case, that the commissioners, instead of meeting at Watkins' Point, came together on the east bank of the Pocomoke, from thence took a view of the country on the other side, and thereupon erroneously concluded that an east line running from Watkins' Point would cross the Pocomoke at the place near Holston's, where they marked certain trees. This being satisfactory to themselves, they proceeded, without further preliminary, to mark the eastern end of the line between the river and the sea.

Scarborough may have known that he was not on the true line, but if so, he kept his knowledge to himself. It is

very certain that Calvert had full faith in the correctness of his work. No doubt he lived and died in the belief that the marks he assisted to make were on a due east line from the westernmost angle of Watkins' Point, properly so called. If any one thinks this a blunder too gross to be credited, let him remember by whom it was shared. Herrman and all subsequent mapmakers place the marks on the straight line where Calvert thought it was. All the public men of the colonies had the same opinion. The error was not discovered, nor even suspected, for more than a hundred years.

But it is argued that the call of the charter is for a straight line; that commissioners were appointed to ascertain where it ran; that they did ascertain it, and marked a part of it; that their judgment being conclusive, the whole line is established as certainly as if it had been marked. So far as this is a geometrical proposition, it is undoubtedly true. But mathematics cannot determine this case against law and equity.

Their own description of the line they agreed upon is inconsistent with itself. They call it an east line from Watkins' Point, and give it an outcome by a course corresponding with Holston's tree. If this be a straight line, how shall we find it? If we begin at Watkins' Point and run east to the sea, we go far below the marked line; if we begin at the marks and run west to the bay, we reach the Annamessex, which is equally wide of the fixed terminus at that end. Yet by one way as much as by the other, we follow the agreed line of the commissioners. We reconcile these contradictions, and carry out the whole agreement, if we run the east line from Watkins' Point until it begins to conflict

with the marked line, and from there to the ocean let the marked line be taken for the exclusively true one.

Plainly, it never was intended by the commissioners, or anybody else, that the territory west of the Pocomoke should be divided by a line extending westward from Holston's to the mouth of the Annamessex. If that was the technical effect of the agreement it was instantly repudiated by the common consent of both provinces. Maryland had held before, and continued afterwards to hold and possess, all the territory between the Pocomoke and the Bay down to the latitude of Watkins' Point, granting the lands, taxing them in the hands of her grantees, and ruling all the inhabitants according to her laws and customs. Her jurisdiction was not intermitted, nor any of her rights suspended, for a moment. Virginia never expressed a suspicion that this possession of Maryland was inconsistent with any right of hers under the agreement. Scarborough himself acquiesced in it to the day of his death as a true construction of his covenants with Calvert.

Our conclusion is that Virginia, by the agreement and her undisturbed occupancy, has an undoubted title to the land east of the Pocomoke, as far north as the Scarborough and Calvert line, while Maryland, by the charter and by her continued possession under it, has a perfect right to the territory west of the Pocomoke and north of Watkins' Point.

We must now go back to Smith's Island. That island is clearly north of the charter line, and all the rights which Virginia has there must depend on the proofs which she is able to give of her possession. The commissioners, agents, and counsel on both sides have, with infinite labor, collected

a great volume of evidence on this part of the case, and discussed it at much length.

In early times Virginia granted lands high up on the island; and Maryland, without expressly denying the right of Virginia, made grants of her own in the same region. The lines of these grants are so imperfectly defined by the surveys that it is not at all easy to tell where they are, and some of them are believed to lie afoul of others. The occupancy, like the titles, was mixed and doubtful. The inhabitants did not know which province they belonged to; at least that was a subject on which there were divers opinions.

A line running nearly across the middle of the island was at first claimed by Virginia as being the old boundary; but a subsequent personal examination and a more careful reconsideration of the evidence brought the counsel themselves to the opinion that a claim by that line could not be supported. They insisted, however, and do still insist, that another line, which runs about three-quarters of a mile above that from Sassafras Hammock to Horse Hammock was and is the true division. There is some evidence that this was once thought to be the boundary.

Two grants, one by Maryland and one by Virginia, each calling for the divisional line between the States, without describing where the divisional line was, were so located on the ground that they met on the line in question. It is inferred from this that a line had been previously run at that place, which was understood to be the division between the provinces or the States. But this argument *a priori* is all that supports the theory of a State line there. If it ever was actually

run, it cannot now be told by whom, when, for what purpose, by what authority, or precisely where. All the evidence relating to it is very doubtful. It dates back to what may be called the prehistoric times of the island. Some witnesses affirm and others deny, on the authority of their forefathers, that this was the dividing line of the States. But none of them can give any substantial grounds for his belief.

Out of this contradictory evidence and above the obscurity of vague tradition there rises one clear and decisive fact, which is this: That for at least forty years last past Maryland has acknowledged the right of Virginia up to a line which, beginning at Sassafras Hammock, runs eastward across the island to Horse Hammock, and Virginia has claimed no higher. By that line alone both States have limited their occupancy for a time twice as long as the law requires to make title by prescription. By that line Maryland has bounded her election district and her county. North of it all the people vote and pay taxes in Maryland, obey her magistrates, and submit to the process of her courts. South of it lies, undisturbed and undisputed, the old dominion of Virginia. We have no doubt whatever that we are bound to regard that as being now the true boundary between the two States. There are not two adjoining farms in all the country whose limits are better settled by an occupancy of forty years, or whose owners have more carefully abstained from all intrusion upon one another within that time.

We have thus ascertained to our entire satisfaction the extent and situation of the territory which each State has held long enough to make a title by prescription, and the boundary now to be determined must conform to those

possessions, no matter at what expense of change in the original lines. We know therefore how the land is to be divided. But how does prescriptive title to land affect the right of the parties in the adjacent waters?

It has been argued with great force and ingenuity that a title resulting merely from long possession can apply only to the ground which the claimant has had under his feet, together with its proper appurtenances; that a river, a lake, or a bay is land covered with water; that land cannot be appurtenant to land; that therefore title by prescription stops at the shore. But this is unsound, because the water in such a case is not claimed as *appurtenant* to the dry land, but as *part* of it. One who owns land to a river owns to the middle of the channel. Upon the same principle, if one State has the territory on both sides the whole river belongs to her. Nor does it make any difference how large or how small the body of water is. The Romans called the Mediterranean *Mare Nostrum*, because her territory surrounded it on all sides. This construction applies with equal certainty to every kind of title, whether it be acquired by express concession, by lawful conquest, or by the long continuance of a possession which, at first, may have been but a naked trespass. In the last case the silent dereliction of the previous proprietor implies a grant of his whole right as fully as if it had been given by solemn treaty.

A few observations upon the several sections of the broken line which we adopt in place of the straight line of the charter will suffice to apply the principles we have endeavored to set forth.

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We run to Sassafras Hammock and from that to Horse Hammock, because we cannot in any other possible way give Virginia the part of Smith's Island to which she shows her right by long possession.

We go thence to the middle of Tangier Sound and from thence downward we divide Tangier Sound equally between the two States, because the possession of Virginia to the shore is proof of a title whose proper boundary is the middle of the water. We give Maryland the other half of the sound for the same or exactly a similar reason, she being incontestibly the owner of the dry land on the opposite shore.

The south line dividing the waters stops where it intersects the straight line from Smith's Point to Watkins' Point, because this latter is the charter line, as modified by the compact, and Maryland has no rights south of it.

From that point of intersection to Watkins' Point we follow the straight line from Smith's Point, there being no possession or agreement which has changed it since 1785.

At Watkins' Point the charter line has stood unchanged since 1632, and the call for a due east line from thence must be followed until it meets the middle thread of the Pocomoke. At the place last mentioned the boundary turns up the Pocomoke, keeping the middle of the river until it crosses the Calvert and Scarborough line. It divides the river that far because the territory on one side belongs to Maryland and on the other to Virginia.

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From the angle formed by the Scarborough and Calvert line with the line last described through the middle of the Pocomoke, the boundary follows the marked line of Scarborough and Calvert to the seashore.

It will be readily perceived that we have no faith in any straight-line theory which conflicts with the contracts of the parties, or gives to one what the other has peaceably and continuously occupied for a very long time. The broken line which we have adopted is vindicated by certain principles so simple, so plain, and so just, that we are compelled to adopt them. They are briefly as follows:

1. So far as the original charter boundary has been uniformly observed and the occupancy of both has conformed thereto, it must be recognized as the boundary still.

2. Whereever one State has gone over the charter line taken territory which originally belonged to the other and kept it, without let or hindrance, for more than twenty years, the boundary must now be so run as to include such territory within the State that has it.

3. Where any compact or agreement has changed the charter line at a particular place, so as to make a new division of the territory, such agreement is binding if it has been followed by a corresponding occupancy.

4. But no agreement to transfer territory or change boundaries can count for anything now, if the actual possession was never changed. Continued occupancy of the granting State for centuries is conclusive proof that the

agreement was extinguished and the parties remitted to their original rights.

5. The waters are divided by the charter line where that line has been undisturbed by the subsequent acts of the parties; but where acquisitions have been made by one from the other of territory bounded by bays and rivers, such acquisitions extend constructively to the middle of the water.

Maryland is by this award confined everywhere within the original limits of her charter. She is allowed to go *to* it nowhere except on the short line running east from Watkins' Point to the middle of the Pocomoke. At that place Virginia never crossed the charter to make a claim. What territory we adjudge to Virginia north of the charter line she has acquired either by compacts fairly made or else by a long and undisturbed possession. Her right to this territory, so acquired, is as good as if the original charter had never cut it off to Lord Baltimore. We have nowhere given to one of these States anything which fairly or legally belongs to the other; but in dividing the land and the waters we have anxiously observed the Roman rule, *suum cuique tribuere*.

J.S. Black,
Pennsylvania.

Chas. J. Jenkins,
Georgia.

A.W. Graham,
Secretary.

APPENDIX D — ACT OF MARCH 3, 1879, ch. 196, 20 Stat. 481, PROVIDING CONGRESS' CONSENT TO THE BLACK-JENKINS AWARD OF 1877

Chap. 196 — An Act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland respecting the boundary between said States.

Whereas arbitrators duly appointed on the part of the State of Virginia and on the part of the State of Maryland for the purpose of ascertaining and fixing the boundary between the States of Virginia and Maryland, did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

"Award.

"And now, to wit, January sixteenth, anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the states of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said states, and examined the proofs on both sides, do find, declare, award, ascertain, and determine that the true line of boundary between the said states, so far as they are coterminous with one another, is as follows, to wit:

"Beginning at the point on the Potomac River where the line between Virginia and West Virginia strikes the said river at low-water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's Point, at or

near the mouth of the Potomac, in the latitude thirty-seven degrees fifty-three minutes eight seconds, and longitude seventy-six degrees thirteen minutes forty-six seconds; thence crossing the waters of the Chesapeake Bay, by a line running north sixty-five degrees thirty minutes east, about nine and à half nautical miles, to a point on the western shore of Smiths Island, at the north end of Sassafras Hammock, in latitude thirty-seven degrees fifty-seven minutes thirteen seconds, longitude seventy-six degrees two minutes fifty-two seconds; thence across Smith's Island south eighty-eight degrees thirty minutes east, five thousand six hundred and twenty yards, to the center of Horse Hammock, on the eastern shore of Smith's Island, in latitude thirty-seven degrees fifty-seven minutes eight seconds, longitude seventy-five degrees fifty-nine minutes twenty seconds; thence south seventy-nine degrees thirty minutes east, four thousand eight hundred and eighty yards, to a point marked A on the accompanying map, in the middle of Tangier Sound, in latitude thirty-seven degrees fifty-six minutes forty-two seconds, longitude seventy-five degrees fifty-six minutes twenty-three seconds, said point bearing from Jane's Island light south fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees thirty minutes west, four thousand seven hundred and forty yards, by a line dividing the waters of Tangier Sound, to a point where it intersects the straight line from Smith's Point to Watkins' Point said point of intersection being in latitude thirty-seven degrees fifty-four minutes twenty-one seconds, longitude seventy-five degrees fifty-six minutes fifty-five seconds, bearing from Jane's Island light south twenty-nine degrees west, and from Horse Hammock south thirty-four degrees thirty minutes east; this point of intersection is

marked B on the accompanying map; thence north eighty-five degrees fifteen minutes east, six thousand seven hundred and twenty yards, along the line above mentioned, which runs from Smith's Point to Watkins' Point until it reaches the latter spot, namely, Watkins' Point, which is in latitude thirty-seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees fifty-two minutes forty-four seconds; from Watkins' Point the boundary line runs due east seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke Sound, which is marked C on the accompanying map, and is in latitude thirty-seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees forty-seven minutes fifty seconds; thence by a line dividing the waters of Pocomoke Sound, north forty-seven degrees thirty minutes east, five thousand two hundred and twenty yards, to a point in said sound marked D on the accompanying map, in latitude thirty-seven degrees fifty-six minutes twenty-five seconds, longitude seventy-five degrees forty-five minutes twenty-six seconds; thence following the middle of the Pocomoke River by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eighth, eighteen hundred and sixty-eight, at a point in the middle of Pocomoke River, and in the latitude thirty-seven degrees fifty-nine minutes thirty-seven seconds, longitude seventy-five degrees thirty-seven minutes four seconds; thence by the Scarborough and Calvert line, which runs five degrees fifteen minutes north of east, to the Atlantic Ocean: the latitudes, longitudes, courses, and distances here given have been measured upon the Coast Chart, number thirty-three, of the United States Coast Survey

(sheet number three, Chesapeake Bay) which is herewith filed as part of this award, and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five, between Smith's point and Watkins' point; in further explanation of this award, the arbitrators deem it proper to add that —

"First. The measurements being taken and places fixed according to the Coast Survey, we have come as near to a perfect mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line, or in the latitude or longitude of a place, the natural objects called for must govern.

"Second. The middle thread of Pocomoke River is equidistant as nearly as may be between the two shores, without considering arms, inlets, creeks, or affluents as parts of the river, but measuring the shore lines from headland to headland.

"Third. The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule, that is to say, from low-water mark at one headland to low-water at another, without following indentations, bays, creeks, inlets, or affluent rivers.

"Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of

low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

"In testimony whereof we have hereunto set our hands the day and year aforesaid.

"J. S. Black, of Pennsylvania,
"Chas. J. Jenkins, of Georgia.
"A.W. Graham
"Secretary"

And whereas the said award has been ratified and confirmed by the legislatures of the States of Virginia and Maryland respectively:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress of the United States is hereby given to the said agreement or award and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

Approved, March 3, 1879.

APPENDIX E — REPORT OF THE COMMISSIONERS TO THE GOVERNORS OF MARYLAND AND VIRGINIA, *THE POTOMAC RIVER COMPACT OF 1958*, REPRINTED IN VIRGINIA HOUSE DOCUMENT NO. 22 (1960)

Mount Vernon, Virginia

December 20, 1958

To

THE HONORABLE THEODORE R. MCKELDIN,
Governor of Maryland

and

THE HONORABLE J. LINDSAY ALMOND, JR.,
Governor of Virginia

This report is respectfully submitted to perpetuate and improve the fisheries of the Potomac River to the mutual advantage and enjoyment of the citizens of the State of Maryland and the Commonwealth of Virginia.

The legislative proposals attached to this report are necessary and are brought about by the accidents of geography and history. When the colony of Maryland was formed, its southern boundary was the Potomac River. Virginia was given the Capes which form the entrance to the Chesapeake Bay and its tributaries.

When the colonies separated from England, each became to all intents and purposes a sovereign and independent

nation. The rights which the citizens of the two new "nations" sought to exercise soon brought about conflict. Maryland controlled the Potomac River and Virginians could not enjoy the fisheries thereof while Virginia controlled the Capes and the Maryland citizens could not pass through the Capes without the payment of toll.

It was not long before those men who had the vision and courage to separate from England saw the need for a solution to the problems confronting the citizens of their two states.

The commissioners from the two states who were appointed to compose the differences, and who were successful in doing so, met at Mount Vernon on March 28, 1785, upon the invitation of that towering figure of American history — George Washington. The success of the conference is undoubtedly due in large measure to his wisdom, although each state was well represented by men of broad vision well endowed with capacities which had met the test of the dark days of the American Revolution. The work of these men in agreeing to the Compact of 1785 led directly to the call for the Constitutional Convention in Philadelphia and subsequently to the adoption of the Constitution of the United States.

The commissioners prepared a compact which was thereafter submitted to the respective legislatures and approved in 1785. The compact dealt with matters other than the fisheries and free passage of the Capes, for these were sovereign contracting parties intending to agree upon all subjects of possible dispute.

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Many of the provisions of the original compact became obsolete with the adoption of the Federal Constitution in 1789 which gave the federal government sole jurisdiction over interstate trade and maritime matters. Notwithstanding this, the other provisions of the compact have long enjoyed unquestioned vitality and have been honored by the two states.

The means employed for regulation of the fisheries was the adoption by the two states of similar concurrent legislation. Over the years, it was the custom for the states to adopt the same legislation governing the fisheries upon the Potomac River. In the early years of the compact, these fisheries were not sufficiently important to require the adoption of similar concurrent legislation concerning the Potomac River. This process went on and a striking degree of similarity was achieved and maintained in the laws of the two states dealing with the Potomac River fisheries.

All thinking citizens realize the adoption of laws does not insure their enforcement. The problems of enforcement may arise from honest difference of opinion as to the proper means for engaging in certain activities, or a calculated disregard of the law, or sympathy on the part of local juries sitting in the trial of cases of persons charged with violation of law. Whatever the reasons, enforcement of the Potomac River statutes became increasingly difficult. As the problems of enforcement increased, so did the expenditures for enforcement. Violation of the Potomac River statutes has not been the exclusive privilege of the citizens of either state.

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In recent years attempts have been made from time to time to establish a bi-state commission to regulate the fisheries of the Potomac River. Differences of opinion have arisen as to the scope of the commission's jurisdiction and the method of appointment. Some bitterness has developed over alleged failure or refusal to enforce the Potomac River statutes and, after a long series of disagreements, the State of Maryland in 1957 adopted an act purporting to repeal the Compact of 1785. At the same session Maryland also repealed portions of her concurrent Potomac River statutes and assumed exclusive jurisdiction and control over the Potomac River. There was further legislation at Annapolis following the repeal, which provided that the citizens of Virginia should receive the same treatment as to the issuance of licenses and other matters having to do with fisheries on the river as the citizens of Maryland.

Virginia also in 1957 instituted a proceeding to invoke the original jurisdiction of the Supreme Court of the United States and to have the court rule invalid the Maryland acts which were designed to repeal the compact and place exclusive jurisdiction of the Potomac River in Maryland. After taking jurisdiction of the case, the Supreme Court of the United States assigned Mr. Justice Stanley Reed to act as a Special Master in the taking of evidence and the preparation of a report for the Court. In discussions among Mr. Justice Reed and Messrs. C. Ferdinand Sybert, Attorney General of the State of Maryland, and A.S. Harrison, Jr., Attorney General of Virginia, it was suggested that the parties should attempt to resolve their differences by the appointment of commissioners from each state to meet and

discuss the matters in dispute with a view to arriving at a satisfactory settlement of the controversy out of court if possible.

The appointment of the Commission arose from the situation in the Potomac River, and the jurisdiction of the Commission was restricted to that area.

Pursuant to this suggestion, Governor McKeldin appointed as commissioners to represent the State of Maryland the following: Carlyle Barton, Esquire, M. William Adelson, Esquire, Judge Stephen R. Collins, Judge Edward S. Delaplaine and William J. McWilliams, Esquire. Governor Almond appointed as commissioners to represent Virginia the following: Mills E. Godwin, Jr., Esquire, John Warren Cooke, Esquire, Howard H. Adams, Esquire, Robert Y. Button, Esquire, and Edward E. Lane, Esquire. The commissioners from each state were assisted by the respective officials in charge of the fisheries program, Attorneys General and staffs, and staffs of the legislative councils.

Following the organization of each commission, a joint meeting was held at Mount Vernon on May 19, 1958. A general discussion was had of the problems confronting the two groups and some tentative proposals were made for further consideration. Thereafter, on June 23-24, 1958, a joint meeting of the two commissions was held in Annapolis and testimony was received concerning the scientific aspects of the Potomac River fisheries. The commissioners from Virginia were the guests of Governor and Mrs. McKeldin. Subsequently the two commissions held joint hearings in

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La Plata, Maryland, on the morning of July 12 and in Warsaw, Virginia, on that afternoon.

We were impressed by the desire of those dependent upon the Potomac fisheries for a living whereby some means might be found for improving the fisheries instead of seeing a constant decline in this production from the Potomac. There seemed to be no major differences of opinion among them as to what ought to be done.

We also heard the testimony of expert marine biologists who assured us that the Potomac River fisheries are on the decline, large areas of the river are barren, and a program is badly needed in which the two states might unite in jointly restoring the fisheries of the Potomac River. There also appeared no area of disagreement between the scientific personnel of Maryland and Virginia as to the problems of the Potomac River.

Upon the conclusion of the hearings, the two commissioners went to Williamsburg and held a joint meeting on the 14th day of July. While in Williamsburg Governor and Mrs. Almond entertained the commissioners and their wives. At the Williamsburg meeting agreement was reached upon many matters and its was then decided that a bi-state agency offered the most practical solution to the conservation and development of the Potomac River Fisheries. The staffs were directed to prepare drafts of measures to carry out the general agreements.

The respective commissions held frequent separate meetings after appointment, but the next joint meeting of

the commission was held on November 14, 1958, at the Decatur House in Washington, D.C. Final agreement was reached upon all but a few minor matters and committees were appointed to reach satisfactory conclusions upon these. Mr. Justice Reed was present for luncheon and was informed of the progress being made.

The final meeting of the commission took place at Mount Vernon on December 20, 1958, at which time agreement was reached upon all matters which were entrusted to the two commissions. A new compact governing the Potomac River fisheries was unanimously approved by the members of the two commissions and a copy marked Appendix I is attached to this joint report, which is signed by all the members of each commission.

The solution proposed is a new compact entitled "The Potomac River Compact of 1958". It sets froth in general the reasons leading to the adoption of the Compact, the jurisdictional area of the Potomac River Fisheries Commission, creates the Commission and provides that it shall consist of six members with three each to be chosen from the respective fisheries commissions of Maryland and Virginia. The Commission is vested with the necessary powers as to employment of personnel, establishment of offices, etc., to enable it to discharge its duties. The Commission is required to make a survey of the oyster bars, required to conduct research relative to the conservation and repletion of fisheries resources, and is empowered to regulate the taking of finfish, crabs, oysters and clams. It may issue licenses to the citizens of each state on the same terms for taking fish and shellfish, and may call upon the agencies of

the respective states to assist it in its duties. It may impose a license tax on oysters taken within the limits of the Potomac River but not to exceed 25¢ per bushel. The Commission is authorized to adopt rules and regulations and provision is made for due notice thereof; judicial review is provided in case of appeal from any such rule or regulation.

It should be pointed out that the laws of Maryland in force on December 1, 1958, and applicable to the Potomac River will remain in force until changed by regulation of the Commission. No regulation may be adopted unless concurred in by at least four members of the Commission, which, it is felt, adequately protects both states. Regulations of the Commission may be amended, modified or rescinded by joint action of the General Assemblies of each of the states.

Enforcement of the regulations will be through the law enforcement agencies of each of the two states. Penalties are provided for violations of the regulations and violators may be taken to an appropriate court in either state in a county adjacent to that part of the Potomac River where the offense occurred. Fines imposed are to be paid to the state in which the case was tried.

Each state pledges that it will appropriate no less than $25,000.00 a year for the expenses and other purposes of the Commission. Provision is made for auditing the expenditures of the Commission.

The new compact would take the place of the Compact of 1785 and would become effective at the expiration of sixty days after the completion of the last act necessary to make it

legally effective. It would also provide that once the new Compact was adopted and ratified by each state, neither could repeal or alter the same without the consent of the other. Thus further litigation between the States before the Supreme Court would be unnecessary and the case would be dismissed.

Clause VII of the Compact of 1785 is reflected in Section 4 of Article 3 and in Section 1 of Article 7 of the new Compact and carries forward certain rights of the citizens of Maryland and Virginia which have not been in controversy. Clause XIII is contained in Article VIII of the new Compact and provides that once ratified, the Company is not to be repealed or amended without the mutual consent of the two states.

We contemplate and respectfully suggest to Your Excellencies that the attached bill be introduced and enacted into law at the first session of your General Assemblies occurring after the making of this report. We further suggest that arrangements be made for the introduction of the Compact in the Congress of the United States, and that steps be taken to assure its adoption in the Congress. As soon as the Compact has been approved by the two states and the Congress, it will become effective upon the expiration of sixty days.

CONCLUSION

We have been impressed by the spirit of cooperation and good will which has prevailed in all of our meetings. In an undertaking of this kind there is seldom a winner or a loser. Those who have participated in the framing of the newly-proposed Compact have approached this task in a

spirit which they hope is worthy of that exhibited by George Washington and the commissioners from the two states who first met at Mount Vernon and reconciled their differences. The shadow of this influence and the imprint of history have inspired us. We have sought to measure up to the responsibilities and trust conferred upon us and in a spirit of mutual confidence, we now submit to Your Excellencies, "The Potomac River Compact of 1958".

Respectfully submitted,

For the State of Maryland:
CARLYLE BARTON
WILLIAM J. MCWILLIAMS
M. WILLIAM ADELSON
STEPHEN R. COLLINS
EDWARD S. DELAPLAINE
Commissioners

For the Commonwealth of Virginia:
MILES E. GODWIN, JR.
HOWARD H. ADAMS
EDWARD E. LANE
ROBERT Y. BUTTON
JOHN WARREN COOKE
Commissioners

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PREAMBLE

Whereas, Maryland and Virginia are both vitally interested in conserving and improving the valuable fishery resources of the tidewater portion of the Potomac River, and

Whereas, certain provisions of the Compact of 1785 between Maryland and Virginia having become obsolete, Maryland and Virginia each recognizing that Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof, as laid out on the Matthews-Nelson survey of 1927, and that Virginia is the owner of the Potomac River bed and waters southerly from said low water mark, as laid out, and the citizens of Virginia have certain riparian rights along the southern shore of the River as shown on said Matthews-Nelson survey, and in common with the citizens of Maryland, the right of fishing in said River. Maryland and Virginia have agreed that the necessary conservation and improvements of the tidewater portion of the Potomac fishery resources can be best achieved by a Commission comprised of representatives of both Maryland and Virginia, charged with the establishment and maintenance of a program to conserve and improve these resources, and

Whereas, at a meeting of the Commissioners appointed by the Governors of the State of Maryland and the Commonwealth of Virginia, to-wit: Carlyle Barton, M. William Adelson, Stephen R. Collins, Edward S. Delaplaine and William J. McWilliams, Esquires, on the part of the State of Maryland and Mills E. Godwin, Jr., Howard H. Adams, Robert Y. Button, John Warren Cooke and

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Edward E. Lane, Esquires, on the part of the Commonwealth of Virginia, at Mount Vernon, in Virginia, on the twentieth day of December, in the year one thousand nine hundred and fifty-eight, the following Potomac River Compact of 1958, between the Commonwealth of Virginia and the State of Maryland was mutually agreed to by the said Commissioners:

Now, Therefore, Be it Resolved by the Commissioners appointed by the Governors of the State of Maryland and the Commonwealth of Virginia, meeting in joint session, that they do unanimously recommend to the said respective Governors that there be a new Compact, to be designated as the "Potomac River Compact of 1958," and that the said new Compact be referred as promptly as possible to the Legislatures of the State of Maryland and the Commonwealth of Virginia for appropriate action, and to the end that after ratification and adoption by said Legislatures the same be submitted to the Congress of the United States for approval.

ARTICLE I. COMMISSION — MEMBERSHIP AND ORGANIZATION

Section 1. *Commission Created*

The Potomac River Fisheries Commission, hereinafter designated as "Commission," is hereby created.

Section 2. *Members*

The Commission shall consist of six members, three from Maryland and three from Virginia. The Maryland

members shall be the members of the Tidewater Fisheries Commission of Maryland or its successor agency and the Virginia members shall be the members of the Virginia Fisheries Commission or its successor agency. If the membership of either of the respective State Commissions exceeds three, then the three Commission members from that state shall be selected by the Governor thereof from the members of the State Commission; and if the membership of either of the respective State Commissions is less than three, the three Commission members from that state shall be the member or members of the State Commission, and such additional person or persons who shall be appointed by the Governor, as may be necessary to constitute a total of three Commissioners.

Section 3. *Term, Vacancies*

The term of Commissioners who are members of their respective State Commissions shall be coterminous with their term on their State Commission. The term of Commissioners who are not members of their State Commission shall be four years. Vacancies on the Commission shall be filled by appointment of the Governor of the state entitled to fill the vacancy, except that where the State Commission has three members, the person filling a vacancy on the State Commission shall *ex officio* become a member of the Commission.

Section 4. *Chairman*

The Chairman of the Commission shall alternate from year to year between representatives of Maryland and

Virginia. Subject to such alternation, the Chairman shall be elected by the Commissioners for a term of one year.

Section 5. *Compensation, Expenses*

Commissioners shall be entitled to receive from the General Fund of the Commission compensation of twenty-five dollars ($25.00) for each day or portion thereof spent in the performance of their duties, and reimbursement for reasonable expenses incident to the performance of their duties.

Section 6. *Meetings, Quorum*

Commission meetings shall be held at least once each quarter, and at such other times as the Commission may determine. Four members shall constitute a quorum for the transaction of business.

Section 7. *Office and Employees*

The Commission shall establish and maintain an office at such locations as it may select, and may employ an Executive Secretary who shall serve at the pleasure of the Commission, and such other administrative, clerical, scientific, and legal personnel as it deems necessary. The powers, duties and compensation of all employees shall be as prescribed by the Commission and the employees shall not be subject to the provisions of Article 64A of the Annotated Code of Maryland nor to the provisions of the Virginia Personnel Act, as the same may be from time to time in effect. The Commission may extend to any employee

or employees membership in the Virginia Supplemental Retirement System or the Maryland Employees' Retirement System, whichever is applicable, subject to the laws relating to each such retirement system.

ARTICLE II. JURISDICTIONAL BOUNDARIES

The territory in which the Potomac River Fisheries Commission shall have jurisdiction shall be those waters of the Potomac River enclosed within the following described area:

Beginning at the intersection of mean low water mark at Point Lookout and an established line running from Smiths Point to Point Lookout, marking Chesapeake Bay waters; thence following the mean low water line of the shore northwesterly across the respective mouths of all creeks to Gray Point at the westerly entrance into Rowley Bay; thence in a straight line northwesterly to the southerly extremity of Kitts Point; thence along the mean low water line to the southwesterly point of St. Inigoes Neck; thence in a straight line westerly to the most easterly point of St. Georges Island; thence following the mean low water line in a general northwesterly direction, across the respective mouths of all creeks and inlets to the southwesterly point of Huggins Point; thence in a straight line southwesterly to the eastern extremity of the sand bar known as Heron Island; thence northwesterly following the ridge of Heron Island Bar to its westerly extremity; thence southwesterly in a straight line to the most southerly point of Blackiston Island; thence in a straight line northwesterly to the southern extremity of Colton's Point; thence following the mean low water line, westerly,

excluding all creeks and inlets, to the point marking the southeasterly entrance into St. Catherine Sound; thence westerly in a straight line to the southern extremity of St. Catherine Island Sandbar; thence northwesterly, along the westerly edge of said sand bar continuing along the mean low water line of the southwesterly side of St. Catherine Island to the northwesterly point of said island; thence westerly in a straight line to Cobb Point Bar Lighthouse; thence northwesterly along the ridge of Cobb Point Sandbar to the southerly extremity of Cobb Point; thence following the mean low water line in general northwesterly and northerly directions across the respective mouths of all creeks and inlets to a point at the easterly entrance into Port Tobacco River, due east of Windmill Point; thence in a straight line westerly to Windmill Point; thence southwesterly following the mean low water line across the respective mouths of all creeks and inlets to Upper Cedar Point; thence southwesterly in a straight line across the mouth of Nanjemoy Creek to a point on shore at the village of Riverside; thence following the mean low water line, southwesterly, northwesterly and northerly, across the respective mouths of all creeks and inlets to Smith Point; thence northerly in a straight line to Liverpool Point; thence northerly in a straight line to Sandy Point; thence following the mean low water line northerly, across the respective mouths of all creeks and inlets to Moss Point; thence northerly in a straight line across Chicamuxen Creek to the southernmost point of Stump Neck; thence following the mean low water line northeasterly, across the respective mouths of all creeks and inlets, to a point at the southerly entrance into Mattawoman Creek; thence in a straight line northeasterly across the mouth of Mattawoman Creek to the southwesterly point of Cornwallis Neck; thence

following the mean low water line northeasterly, across the respective mouths of all creeks and inlets, to Chapman Point; thence in a straight line northeasterly to Pomonkey or Hollis Point; thence following the mean low water line in a northerly direction across the respective mouths of all creeks and inlets, to a point on Marshall Hall shore, due south of Ferry Point; thence northeasterly in a straight line to Bryan Point; thence northeasterly in a straight line to the northwest extremity of Mockley Point; thence northeasterly in a straight line to Hatton Point; thence northerly in a straight line to the southwesternmost point of Indian Queen Bluff; thence following the mean low water line northerly across the respective mouths of all creeks and inlets, to Rosier Bluff Point; thence in a straight line northerly to the intersection with the District of Columbia Line at Fox Ferry Point; thence following the boundary line of the District of Columbia southwesterly to a point on the lower or southern shore of the Potomac River, said point being the intersection of the boundary line of the Commonwealth of Virginia with the boundary line of the District of Columbia; thence following the mean low water line of the Potomac River on the southern, or Virginia shore, as defined in the Black-Jenkins Award of 1877 and as laid out in the Matthews-Nelson Survey of 1927, beginning at the intersection of the Potomac River and the District of Columbia Line at Jones Point and running to Smiths Point; and thence in a straight line across the mouth of the Potomac River on the established line from Smiths Point to Point Lookout, to the mean low water mark at Point Lookout, the place of beginning.

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ARTICLE III. COMMISSION POWERS AND DUTIES

Section 1. *Oyster Bars*

The Commission shall make a survey of the oyster bars within its jurisdiction and may reseed and replant said oyster bars as may from time to time be necessary.

Section 2. *Fish and Seafood*

The Commission may by regulation prescribe the type, size and description of all species of finfish, crabs, oysters, clams and other shellfish which may be taken or caught within its jurisdiction, the places where they may be taken or caught, and the manner of taking or catching.

Section 3. *Research*

The Commission shall maintain a program of research relating to the conservation and repletion of the fishery resources within its jurisdiction, and to that end may cooperate and contract with scientists and public and private scientific agencies engaged in similar work, and may purchase, construct, lease, borrow or otherwise acquire by any lawful method such property, structures, facilities, or equipment as it deems necessary.

Section 4. *Licenses*

(a) The Commission shall issue such licenses as it may prescribe which shall thereupon be required for the taking of finfish, crabs, oysters, clams,

or other shellfish from the waters within the jurisdiction of the Commission, and for boats, vessels and equipment used for such taking. Recognizing that the right of fishing in the territory over which the Commission shall have jurisdiction is and shall be common to and equally enjoyed by the citizens of Virginia and Maryland, the Commission shall make no distinction between the citizens of Virginia or Maryland in any rule, regulation or the granting of any licenses, privileges, or rights under this Compact.

(b) Licenses for the taking of oysters and clams and the commercial taking of finfish and crabs within the jurisdiction of the Commission shall be granted only to citizens of Maryland or Virginia who have resided in either or both states for at least twelve months immediately preceding the application for the license. Within six months after the effective date of this Compact, the Commission shall adopt a schedule of licenses, the privileges granted thereby, and the fees therefor, which may be modified from time to time in the discretion of the Commission.

(c) The licenses hereby authorized may be issued at such places, by such persons, and in accordance with such procedures as the Commission may determine.

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Section 5. *Expenditures*

The Commission is authorized to expend funds for the purposes of general administration, repletion of the fish and shellfish in the Potomac River, and the conservation and research programs authorized under this Compact, subject to the limitations provided in this Compact.

Section 6. *Grants, Contributions, Etc.*

The Commission is authorized to receive and accept (or to refuse) from any and all public and private sources such grants, contributions, appropriations, donations, and gifts as may be given to it, which shall be paid into and become part of the General Fund of the Commission, except where the donor instructs that it shall be used for a specific project, study, purpose, or program, in which event it shall be placed in a special account, which shall be administered under the same procedure as that prescribed for the General Fund.

Section 7. *Cooperation of State Agencies*

The Commission may call upon the resources and assistance of the Virginia Fisheries Laboratory, the Maryland Department of Research and Education, and all other agencies, institutions and departments of Maryland and Virginia which shall cooperate fully with the Commission upon such request.

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Section 8. *Regulations*

The Commission shall have the power to make, adopt and publish such rules and regulations as may be necessary or desirable for the conduct of its meetings, such hearings as it may from time to time hold, and for the administration of its affairs.

Section 9. *Inspection Tax*

The Commission may impose an inspection tax, in an amount as fixed from time to time by the Commission, not exceeding 25¢ per bushel, upon all oysters caught within the limits of the Potomac River. The tax shall be paid by the buyer at the place in Maryland or Virginia where the oysters are unloaded from vessels and are to be shipped no further in bulk in vessel, to an agent of the Commission, or to such officer or employee of the Virginia Fisheries Commission or of the Maryland Department of Tidewater Fisheries, as may be designated by the Commission, and by him paid over to the Commission.

ARTICLE IV. COMMISSION REGULATIONS — PROCEDURES AND REVIEW

Section 1. *Notice, Hearing, Vote*

No regulation shall be adopted by the Commission unless: (a) a public hearing is held thereon, (b) prior to the hearing the Commission has given notice of the proposed regulation by publication thereof at least once a week for three successive weeks in at least one newspaper published,

or having a general circulation in each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction. The first such publication to be at least thirty days but not more than 45 days prior to the date of the hearing; (c) a copy of the proposed regulation is mailed at least 30 days but not more than 45 days prior to the hearing, to the clerk of the court of each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction, who shall post the same in a conspicuous place at or in the courthouse; and (d) the regulation is approved by at least four members of the Commission.

Section 2. *Recording, Effective Date*

(a) Regulations of the Commission shall be exempt from the provisions of Chapter 1.1 of Title 9 of the Code of Virginia (1950 Edition, as amended from time to time), and of Section 9 of Article 41 of the Annotated Code of Maryland (1957 Edition, as amended from time to time). Copies of Commission regulations shall be kept on public file and available for public reference in the offices of the Commission, the office of the clerk of court in each county of Maryland and Virginia contiguous to the waters within the Commission's jurisdiction, the office of the Virginia Division of Statutory Research and Drafting, the office of the Maryland Department of Legislative Reference, the office of the Virginia Fisheries Commission, and the office of the Maryland Department of Tidewater Fisheries.

(b) No regulation of the Commission shall become effective until thirty (30) days after the date of its adoption, or such later date as may be fixed by the Commission.

Section 3. *Review*

Any person aggrieved by any regulation or order of the Commission may at any time file a petition for declaratory judgment with respect to the validity or construction thereof, in the circuit court of any county in Maryland or Virginia contiguous to the waters within the Commission's jurisdiction. A review of the final judgment of the circuit court may be appealed to the court of highest appellate jurisdiction of the state in accordance with the rules or laws of procedure in such state.

Section 4. *Revision by Legislative Action*

Regulations of the Commission may be amended, modified, or rescinded by joint enactment of the General Assembly of Maryland and the General Assembly of Virginia.

ARTICLE V. ENFORCEMENT OF LAWS AND REGULATIONS: PENALTIES

Section 1. *Responsibility for Enforcement*

The regulations and orders of the Commission shall be enforced by the law enforcement agencies and officers of Maryland and Virginia.

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Section 2. *Penalties*

The violation of any regulation of the Commission shall be a misdemeanor. Unless a lesser punishment is provided by the Commission, such violation shall be punishable by a fine not to exceed one thousand dollars ($1,000.00) or confinement in a penal institution for not more than one (1) year, or both, in the discretion of the court, and any vessels, boat, or equipment used in the taking of finfish crabs, oysters, clams or other shellfish from the Potomac River in violation of any regulation of the Commission or of applicable laws may be confiscated by the court, upon the abandonment thereof or the conviction of the owner or operator thereof.

Section 3. *Jurisdiction of Court*

The officer making an arrest or preferring a charge for violation of a regulation of the Commission or an applicable state law respecting the waters within the Commission's jurisdiction shall take the alleged offender to a court of competent jurisdiction in either State, in a county adjacent to the portion of the Potomac River where the alleged offense occurred, which shall thereupon have jurisdiction over the offense.

Section 4. *Disposition of Fines and Forfeitures*

All fines imposed for violation or regulations of the Commission or applicable state laws respecting the waters within the Commissions' jurisdiction shall be paid into the court in which the case is prosecuted, and accounted for under the laws applicable to that court. Any property confiscated

under the provisions of this Compact shall be turned over to the Commission, which may retain, use or dispose of as its deems best.

ARTICLE VI. COMMISSION FINANCES

Section 1. *Budget*

The Commission shall approve and adopt a proposed annual budget showing estimated income, revenues, appropriations, and grants from all sources, and estimated necessary expenditures and shall send a copy thereof to the Governors of Maryland and Virginia.

Section 2. *Appropriations*

The said Governors shall place in the proposed Budget of their respective states for each year the sum of not less than twenty-five thousand dollars ($25,000.00) for the expenses and the other purposes of the Commission for that year; and the General Assembly of each of the two states agrees to appropriate annually not less than this sum to the Commission.

Section 3. *General Fund*

(a) The General Fund shall consist of: (1) all income and revenue received from the issuance of licenses under this Compact; (2) the proceeds of the disposition of property confiscated pursuant to the provisions of this Compact; (3) the proceeds of the inspection tax upon

oysters imposed pursuant to this Compact; and (4) the funds appropriated to the Commission by the two states.

(b) The General Fund of the Commission shall be kept in such bank or depository as the Commission shall from time to time select. The General Fund shall be audited annually by the Auditor of Public Accounts of Virginia and the State Auditor of Maryland acting jointly, and at such other times as the Commission may request.

ARTICLE VII. EFFECT ON EXISTING LAWS AND PRIOR COMPACT

Section 1.

The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact, and the decisions of the courts construing that portion of Article VII of the Company of 1785 relating to the rights of riparian owners shall be given full force and effect.

Section 2. *Existing Laws*

The laws of the State of Maryland relating to finfish, crabs, oysters, and clams in the Potomac River, as set forth in Article 66C of the Annotated Code of Maryland and as in

effect on December 1, 1958, shall be and remain applicable in the Potomac River except to the extent changed, amended, or modified by regulations of the Commission adopted in accordance with this Compact.

Section 3. *Existing Licenses*

The rights and privileges of licensees to take and catch finfish, crabs, oysters, clams, and other shellfish in the Potomac River, which are in effect at the time this Compact becomes effective, shall continue in force subsequent to the adoption of this Compact, subject to the power of the Commission, by regulation, to modify or abolish any class of licenses or the rights of any particular class of licensees.

ARTICLE VIII. EFFECT OF RATIFICATION

These articles shall be paid before the Legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed or altered by either, without the consent of the other.

ARTICLE IX. EFFECTIVE DATE

This Compact, which takes the place of the Compact of 1785 between Maryland and Virginia, shall take effect at the expiration of 60 days after the completion of the last act legally necessary to make it operative, and thereupon the said Compact of 1785 shall no longer have any force or effect.

Appendix E

IN TESTIMONY WHEREOF, the Commissioners, on the part of the State of Maryland and the Commonwealth of Virginia, evidence their agreement to the provisions of this Compact by becoming parties signatory this, the twentieth day of December, in the year one thousand, nine hundred and fifty-eight, at Mount Vernon, in Virginia; and now witnesseth:

Commissioners of the Part of Maryland	Commissioners of the Part of Virginia
CARLYLE BARTON	MILES E. GODWIN, JR.
WILLIAM J. MCWILLIAMS	HOWARD H. ADAMS
M. WILLIAM ADELSON	EDWARD E. LANE
STEPHEN R. COLLINS	ROBERT Y. BUTTON
EDWARD S. DELAPLAINE	JOHN WARREN COOKE

APPENDIX F — POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT OF 1978

POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of January 1978, by and among the UNITED STATES OF AMERICA (hereinafter called "the Government") acting by the Secretary of the Army through the Chief of Engineers, the STATE OF MARYLAND (hereinafter called "the State") acting by the Governor and the Secretary of the Department of Natural Resources, the COMMONWEALTH OF VIRGINIA (hereinafter called "the Commonwealth") acting by the Governor and the Chairman of the State Water Control Board; the DISTRICT OF COLUMBIA (hereinafter called "the District") acting by its Mayor, the WASHINGTON SUBURBAN SANITARY COMMISSION (hereinafter called "the Commission") acting by its Chairman; and the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called "the Authority") acting by its Chairman;

PREFACE

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the primary purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Government situate in the District of Columbia and its environs, and thereafter of providing a public water supply for the inhabitants of the District of Columbia; and

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WHEREAS, the Secretary of the Army is authorized, subject to certain conditions, to supply treated water from the Washington Aqueduct to any competent state or local authority in the Washington Metropolitan Area in Virginia, and to that end has entered into agreements with the County of Arlington and the City of Falls Church, Virginia; and

WHEREAS, the sole source of raw water treated by the Washington Aqueduct and dispensed therefrom is the Potomac River, and the Washington Aqueduct is now maintaining intake facilities for this purpose at Little Falls and Great Falls, Maryland; and

WHEREAS, the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the State's Department of Natural Resources (hereinafter called "the Administration") to appropriate or use the water of the Potomac River; and

WHEREAS, the parties to this Agreement recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made herein requiring that access by any of them to such water be made subject to the provisions of this Agreement; and

WHEREAS, the Commission is charged with the responsibility of providing a safe and adequate public water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into

agreements to provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission maintains a water treatment plant and an intake therefrom on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement, and in addition the Commission maintains a water treatment plant with intake on the Patuxent River, and requires water from both sources in order to fulfill its above-mentioned responsibilities for providing a public water supply; and

WHEREAS, the City of Rockville, Maryland, is operating and maintaining water treatment facilities and a water distribution system and maintains an intake facility about one mile upstream from Great Falls on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement; and

WHEREAS, the Fairfax County Water Authority is an authority in the Commonwealth of Virginia proposing to withdraw water from that portion of the Potomac River which is covered by this Agreement and has applied for a permit to construct a water intake structure for such purpose; and

WHEREAS, in the absence of adequate upstream impoundments and associated flow regulation, the quantity of water which may flow in the Potomac River between Little Falls Dam and the farthest upstream limit of the pool of water

behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland, during periods of low flow in that portion of the River, may be less than the quantity needed to meet the demand for all customary public water supply purposes during such periods; and

WHEREAS, in light of the Federal legislative enactments providing for the Corps of Engineers to supply water to the District of Columbia, enactment of legislation was deemed by the Government to be a prerequisite to its participation in a Potomac River Low Flow Allocation Agreement; and

WHEREAS, the consent of Congress to a Potomac River Low Flow Allocation Agreement is expressly stated in Section 181 of the Water Resources Development Act of 1976, Public Law 94-587; and

WHEREAS, the consent of Congress, pursuant to Section 9 of the Rivers and Harbors Act of 1899, to the construction of a water diversion structure by the Commission from the north shore of the Potomac River at the Commission's water filtration plant to the north shore of Watkins Island is conditioned in Section 181 of the aforesaid Water Resources Development Act of 1976 upon an enforceable Low Flow Allocation Agreement; and

WHEREAS, it is the judgment of the Chief of Engineers and the Secretary of the Army, acting pursuant to Section 10 of the Rivers and Harbors Act of 1899, that the public interest requires that such a Low Flow Allocation Agreement be a requirement for issuance of the permits for the

construction of water intake structures in the subject portion of the Potomac River by the Commission and the Fairfax County Water Authority;

NOW, THEREFORE, in consideration of the premises and of the public and governmental interests deemed to be served hereby, the parties hereto do mutually agree as follows:

Article I. Enforcement.

A. Certain Definitions:

1. Pertinent Portion of the River. The portion of the Potomac River subject to this Agreement is that located between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland. This portion is referred to herein as "the defined portion" or, alternately "the subject portion" of the Potomac River.

2. Parties. The Government, the State, the Commonwealth, and the District shall be termed "the governing parties." All other parties hereto shall be termed "member parties." The term "parties" shall mean all parties, both governing and member, except when the context otherwise requires.

B. Moderator. Authority to enforce the provisions of this Agreement shall be vested in an unbiased Moderator. It shall be the duty of the Moderator and he shall have the authority:

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1. To take all actions necessary to enforce the provisions of this Agreement and his decisions hereunder, and for this purpose he may sue in his own name.

2. To decide all disputes between or among the parties arising under this Agreement not disposed of by consent.

The authority of the Moderator shall not restrict those powers reserved to the parties, including those specified in Article 3, Section C.

C. The decision of the Moderator shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, or not supported by substantial evidence. All parties agree to accept and implement every decision of the Moderator unless and until said decision is overturned by a court of competent jurisdiction.

D. The parties specifically grant to the Moderator the authority to inspect documents, records, meters, facilities, and other items necessary to decide any question or verify reports made by any party as a consequence of this Agreement. Upon the request of any party, the Moderator shall provide said party any or all of the information held by him relevant to this Agreement.

E. Should the Moderator decide to commence or defend any action or otherwise have need of legal services relating to this Agreement, he shall have the right to contract with

counsel for such purpose, and the cost of such services shall be repaid in equal shares by the governing parties. In the interest of prompt action; the Moderator may accept legal services, or an advance of funds, for such purpose from any party. Nothing herein shall require a party being sued by the Moderator to advance funds for such purpose.

F. The Moderator shall not be liable for injury or damage resulting from any decision or action taken in good faith without malice under apparent authority of this agreement, even though such decision or action is later judicially declared to be unauthorized or invalid.

G. The Moderator shall be selected, and may be relieved of his duties for any reason, by unanimous action of the governing parties expressed in a signed memorandum. Should the office of Moderator become vacant through death, resignation, or otherwise, a new Moderator shall be selected as soon as practicable by such unanimous action. During any period in which the office of Moderator remains vacant through a failure of unanimous action or otherwise, the full functions of the office of Moderator shall be exercised by a Standby Moderator who shall, except as expressly otherwise provided, be treated as the Moderator for all purposes under the provisions hereof. The duty to designate the Standby Moderator shall rotate annually among the Government, the State, the Commonwealth, and the District in the order stated, beginning on the date this agreement becomes effective and rotating thereafter on the first day of each calendar year. Written notice of such annual designation shall be sent to all other parties by January 15 of each year. The first Moderator for this Agreement is designated in Annex A hereto.

H. Subject to the availability of funds, the reasonable expenses, including legal fees, and compensation of the Moderator shall be paid in equal shares by the governing parties. Any expense shall be deemed reasonable if at least three of the governing parties so agree or if so determined by a court. If any such party accepts as reasonable a particular expense not accepted as reasonable by the other such parties, that party may pay that expense, in addition to that party's proportionate share of all other expenses. At the time of each annual review as provided in Article 4 of this agreement, the governing parties shall set, by majority vote, the per diem fee to be paid a Moderator in the event his services shall be necessary. A Standby Moderator, who is an employee of the designating party or one of its political subdivisions or agencies, shall serve without fee in exercising the functions of the Moderator.

I. The Moderator or any party may bring an action against any one or more other parties to enforce this Agreement or a decision of the Moderator made hereunder. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in said court and to service of process upon it from said court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States. In any such action the joinder of all parties hereto shall not be deemed necessary or indispensable merely because they are parties to this Agreement. Application for or receipt of a determination by the Moderator shall not be a prerequisite to the maintenance of an action by a party, but any decision made by the Moderator on a matter involved in said action, whether before

or after commencement thereof, shall be given the effect set forth in Article I, Section C. Nothing herein shall be deemed to be a waiver of any immunity any party may have from a claim for monetary damages or a claim which has substantial fiscal impact, except for the fees and expenses which are provided to be paid pursuant to the agreement. It is the intention of the parties that any matters involving the technical aspects of maintenance of litigation be resolved in a manner which ensures rapid and certain enforcement of this Agreement.

Article 2. Administration.

A. Washington Aqueduct. The Government will provide a communication control center at the Washington Aqueduct for the administration of the allocation plan as provided herein. The Washington Aqueduct Division, U. S. Army Engineer District, Baltimore ("the Aqueduct"), will collect, receive, record and accumulate daily reports regarding the flow of the Potomac River and the quantities of water being withdrawn from the defined portion of the Potomac River, and the quantities of water withdrawn and available from all other sources for use within the Washington Metropolitan Area, by the parties and the political subdivisions, authorities, and permittees of any of them, and by any other water withdrawing entity which may formally be added or made subject to this Agreement subsequent to its initial execution. Subject to the parties' rights of appeal to the Moderator, the parties grant to the Aqueduct, and to each other, the right to inspect documents, records, meters, facilities and other items necessary to decide any question or verify reports made by any party as a consequence

of this agreement. Beginning with the Alert Stage, the Aqueduct will keep the Moderator informed as to the stage of flow in the Potomac River, and, during the Restriction and Emergency Stages the fair share allocated to each user, and all information utilized for determining the allocation. The Aqueduct will provide all parties with the same information relating to allocation, the quantities of water being withdrawn by all users from any and all sources, and the flow of the Potomac River. To permit uniformity of reports and to implement the administrative measures specified herein, reports and calculations, by or to the Aqueduct, of daily withdrawals or daily flows, will be based on the twenty-four hour period from one midnight to the following midnight, unless the parties subsequently agree to a different twenty-four hour measuring period. The Aqueduct will calculate the total daily flow by adding the withdrawals during the previous 24 hours at all withdrawal points and the remaining daily flow over the Washington Aqueduct Dam at Little Falls, as determined by the readings recorded on the USGS gage at Little Falls during the preceding twenty-four (24) hours. The average reading will determine the flow over the dam for the previous day.

B. Stages of Flow in the Potomac River. The Aqueduct will determine from the information accumulated when the following stages exist in the defined portion of the Potomac River.

1. Alert Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than fifty percent (50%) of the total daily flow, but less than 80%, the Aqueduct will declare an "Alert Stage" to be in effect.

2. Restriction Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than eighty percent (80%) of the total daily flow, the Aqueduct will declare a "Restriction Stage" to be in effect and the Aqueduct will request the U. S. Park Service to discontinue putting Potomac River water into the C&O Canal.

3. Emergency Stage. When the estimated total daily withdrawal for any day within the ensuing five (5) days from the subject portion of the Potomac River is expected to exceed the daily river flow anticipated, the Aqueduct will declare an "Emergency Stage" to be in effect.

C. Allocation of Flow. Whenever the Restriction Stage or the Emergency Stage is in effect, the Aqueduct shall daily calculate and advise each user (as defined herein), and the Moderator, of each user's allocated fair share of the water available from the subject portion of the Potomac River in accordance with this Section C. In calculating the amount of water available for allocation, the Aqueduct will determine, in consultation with the parties and based upon then current conditions and information, any amount needed for flow in the Potomac River downstream from the Little Falls dam for the purpose of maintaining environmental conditions ("environmental flow-by"), and shall balance such need against essential human, industrial and domestic requirements for water. The Aqueduct's determination shall be based upon the data and shall give substantial weight to conclusions for environmental flowby submitted by the State.

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1. For the purposes of this Section C, the term "users" refers to the following entities which are or may be appropriating water for public water supply purposes from the subject portion of the Potomac River; namely, the Government (including its water customers), the Commonwealth for and on behalf of herself and each of her political subdivisions and authorities (including the Authority), the State and the Administration (for and on behalf of its permittees whether or not parties to this Agreement), the District of Columbia, the Commission, and such entities which may formally be added or made subject to this Agreement subsequent to its initial execution.

2. Each user shall report to the Aqueduct (and to each other) the number of gallons of processed water pumped daily to all its customers from all sources during each winter period (the months of December through February), commencing with the winter period 1977-78. The amounts pumped during the 5 most recent winter periods which have elapsed as of the time of allocation, or less than 5 if fewer have so elapsed, shall be combined for the purpose of computing each user's average daily winter use; except that, in the case of a user first withdrawing water subsequent to the initial execution of the Agreement, the average daily winter use of such user shall be the average of the amounts of water pumped during all of the winter periods, commencing December 1 of the year immediately prior to its first withdrawal from the subject portion of the river, which have elapsed as of the time of allocation, but not exceeding the 5 most recent winter periods. The ratio which the average daily

winter use of each user bears to the average daily winter use of all users will be applied to the daily amount of water available at the time of allocation from the subject portion of the Potomac River (after deduction for environmental flow-by) and all other sources as specified in Paragraph 5 below (calculated at maximum capacity practicable). The resulting amount, less the amount then available to said user by use of the maximum capacity practicable from all such other sources, will be such user's allocated fair share of the flow of the Potomac River.

3. a. The formula set forth in Article 2.C.2. shall continue in effect unless changed by unanimous consent of the governing parties or as set forth below. After January 1, 1988, any of the governing parties which desires to change the allocation formula shall give written notice to all other parties. Within 60 days thereafter, both the governing and member parties shall meet for the purpose of negotiating a replacement formula. In the event that no such replacement formula is agreed on by the governing parties within one year after receipt of the aforesaid notice, the allocation ratio which would have been in effect for the summer of the year in which the notice was given shall be used as in interim allocation ratio for the withdrawal of water during subsequent periods of low flow until such time as the governing parties agree upon a replacement formula. Any governing party, at any time after the expiration of one year from the receipt of such notice and after the exhaustion of such administrative procedures as may be applicable if it is a permittee for

water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it or users associated with it may have to a greater share of water than set by the interim allocation ratio, provided that all parties shall adhere to the interim allocation ratio until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be received and processed during periods in which the interim allocation ratio is in effect, but such ratio shall be recalculated only in the event of the grant of an application to a new user as set forth in Section E of Article 3.

b. Any formula negotiated pursuant to subparagraph a hereof shall allocate water on a fair and equitable basis and shall take into consideration, among other things, (a) steps taken by parties which can do so to minimize dependence upon the Potomac River during periods of low flow, (b) the nature and effectiveness of water conservation methods put into effect, (c) steps taken to increase the water supply available for the Washington Metropolitan Area, (d) then current population growth and planning for future growth, (e) feasibility and availability of new sources of water, and (f) technological advances in water treatment and water quality measurement.

c. In any court proceeding instituted pursuant to subparagraph a, neither the signing of this agreement nor the passage of time thereafter shall be asserted as a waiver or diminution of any party's rights to, or right to

seek, a greater share of water from the subject portion of the river. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in such court and to service of process upon it from such court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States.

4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct for reallocation.

5. The water subject to the allocation formula under the terms of this Agreement includes the maximum capacity practicable from Patuxent and Occoquan as it exists in each case on December 31, 1977, and both the natural flow and the augmented flow from existing upstream reservoirs, in addition to Bloomington Lake, of the subject portion of the Potomac River. Any other augmentation to flow, reservoir storage, or treating capacity developed by a user after December 31, 1977, shall not be made subject to the allocation formula, but those users who incur, or participate in the payment of, the expenditures for such augmentation may agree as to how it is to be divided and shall file a copy of said agreement with the other parties. In recognition that the sole source of water supply for the District of Columbia is the Potomac River, each other party will offer the District an opportunity to participate in a portion of any

additional augmentation for use during the Restriction and Emergency stages on reasonable terms, unless such party shows that it is infeasible to do so.

6. In the event a disaster, such as a major fire or water main break, results in an abnormal loss of a significant portion of any user's water supply, the Aqueduct shall determine suitable adjustments in low flow allocation during the emergency period created by the disaster only, taking into consideration all sources available to the users.

7. Water from the emergency pumping station having its intake at the estuary of the Potomac shall not be considered as water available from other sources for the purposes of Section 2.C.2. or otherwise included in computations made under this agreement.

Article 3. Obligations of the Parties.

A. The Government agrees to cause the Aqueduct as the operating agency to perform the functions and requirements which are required of the Government and the Aqueduct in this Agreement, including the furnishing of information to the other parties relating to the Aqueduct's water withdrawal and use, the same as required by other parties to be furnished to the Aqueduct under Subparagraphs B and D, of this Article. These functions and responsibilities of the Aqueduct shall be carried out under the supervision of the District Engineer, U. S. Army Engineer District, Baltimore, or his designee, who shall be responsible for making the determinations required in the discharge of these responsibilities.

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B. The parties agree to provide the Aqueduct with all the information relating to the withdrawal and use by them, their permittees, entities reporting through them and their political subdivisions, as applicable, of the waters of the subject portion of the Potomac River and availability from other sources which is needed for the administration of the allocation system.

C. The State agrees that all appropriation permits granted by the Administration for any appropriation of water from the subject portion of the Potomac River shall include a provision subjecting the permittee to the provisions of this Agreement. Nothing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River; nor any such authority as the Commonwealth may have; nor the authority of the Government with respect to navigable waters, including the regulation of commerce among the states and with foreign nations.

D. The parties will comply with the determinations made by the Aqueduct pursuant to this Agreement, unless and until overturned pursuant to the terms of Article 1.

E. Any community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which includes the low flow allocation formula and such other provisions as are necessary to effect

the purposes of this Agreement. Any such community or entity may apply for permits necessary to build water intake structures or to appropriate water, and such permits shall be processed in accordance with the rules and regulations of the permit-issuing agency, notwithstanding the pendency of negotiations or the imposition of an interim allocation ratio pursuant to Section 2.C.3. If the necessary permits are granted to a community or entity not previously withdrawing water from the subject portion of the river, the existing interim allocation ratio shall be recalculated based on winter period use for the year immediately prior to the first withdrawal from the subject portion of the river by such new user. The average daily winter use of the new user for such winter period and those of the other users employed in determining the interim allocation ratio shall be employed to compute a revised interim allocation ratio which shall remain in effect until a replacement formula is determined pursuant to Section 2.C.3.

F. This Agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages.

Article 4. Review

In the month of April in each year during the term of this Agreement the parties shall convene for the purpose of

reviewing the provisions of this Agreement and considering any modifications thereof, and make such modifications as the governing parties agree upon. Upon agreement among the governing parties, review and modifications as might be agreed upon can occur at any time and not be necessarily limited to the annual, April consideration. Entities shall be admitted as new member parties upon unanimous agreement of the governing parties.

Article 5. Revocation.

This Agreement shall not be revoked without the unanimous consent of the governing parties.

Article 6. Effective Date.

This Agreement shall become binding when: (1) it is executed by the parties, and (2) a Moderator has been selected as provided in Article 1.G, and (3) the Government issues one or more permits for the construction of any water diversion structure or water intake in the subject portion of the Potomac River to any party hereto or political subdivision or authority thereof, and (4) all acts have been taken by each of the parties hereto necessary to make this agreement binding and enforceable with respect to each of them, including, if necessary, ratification by the legislatures of the signatory states. Notice that all such necessary acts have been taken by each of the parties shall be delivered to the other parties along with the opinion of its respective counsel or attorney general that the acts taken are sufficient to cause this agreement to become effective, binding and enforceable under the laws or charter of such parties. The parties will,

however, commence to record and maintain the consumption figures and other base data called for under the foregoing provisions of this Agreement, at the time they execute this Agreement. This Agreement may be executed in one or more counterparts.

Article 7. Severability.

The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of the agreement is declared to be unconstitutional or the applicability thereof to any party is held invalid, the remainder of such agreement shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written, except as a different date of execution may be noted following any party's signature.

ATTEST: THE UNITED STATES OF AMERICA

/s/ _____ BY /s/ _____
Secretary of the Army

/s/ _____
Chief of Engineers

Appendix F

THE STATE OF
MARYLAND

/s/ _____ BY /s/ _____
Governor

/s/ _____
Secretary of Natural
Resources

THE COMMONWEALTH
OF VIRGINIA

/s/ _____ BY /s/ _____
Governor

/s/ _____
Vice Chairman, State
Water Control Board

THE DISTRICT OF
COLUMBIA

/s/ _____ BY /s/ _____
EXECUTIVE Mayor
SECRETARY, D. C.

/s/ _____
Director of
Environmental Services

Appendix F

THE WASHINGTON
SUBURBAN SANITARY
COMMISSION

/s/ _____ BY /s/ _____
Chairman

FAIRFAX COUNTY WATER
AUTHORITY

/s/ _____ BY /s/ _____
Chairman

Appendix F

MODIFICATION NO. 1
POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT
DATED AS OF JANUARY 11, 1978

ARTICLE 2.C.2. is modified by adding the phrase "On or before March 15 of each year," at the beginning of the first sentence.

ARTICLE 2.C.3.a. is modified by adding the following paragraphs at the end thereof:

> "During such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the District, the Authority and the Commission providing for the regional management of all their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the foregoing paragraph shall be inoperative and the following paragraph shall become operative.
>
> The allocation formula set forth in Article 2.C.2., or any subsequently revised or replacement formula, may be revised or replaced by unanimous agreement of the governing parties as herein provided. At the April 1985 meeting of the parties and at each fifth annual April meeting thereafter, the parties shall review and evaluate the fairness and reasonableness of the formula then in effect in the light of: experience gained in the operation of the agreement during the preceding five year period; then current estimates of future water demands in the

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Washington Metropolitan Area; adequacy of then available and prospective future supplies of water to satisfy future demands; experience gained in the regional management of available water supply facilities to optimize their use; factors listed in subparagraph 2.C.3.b.; and such other factors as may be pertinent. If as a result of any such review and evaluation the governing parties shall determine that the formula then in effect is not fair and reasonable, they shall revise or replace the formula in such manner as they shall deem appropriate. Notwithstanding the foregoing, if at any other time any party desires to secure a revision or replacement of the formula, it shall give written notice thereof to all other parties and, within 60 days after such notification, the parties shall meet for the purpose of negotiating a revision or replacement of the formula. Unless and until a revised or replacement formula is agreed upon by unanimous agreement of the governing parties, the formula then in effect shall continue in effect. However, any party, at any time after the expiration of one year from the filing of such notice and after the exhaustion of such administrative procedures as may be applicable if it is a permittee for water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it or users associated with it may have to a greater share of water than set by the formula then in effect. All parties shall adhere to the formula then in effect until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be received and processed during periods in which negotiations of a revised or replacement formula

are in effect and during the pendency of any litigation relating thereto."

ARTICLE 2.C.4. is modified to read as follows:

"4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct and the Aqueduct shall reallocate said excess amount among the other users in a reasonable manner."

ARTICLE 2.C.5. is modified to read as follows:

"5. The water subject to the allocation formula under the terms of this Agreement includes (i) the maximum capacity then practicable from the Patuxent River and the Occoquan River; (ii) the natural flow of the subject portion of the Potomac River; and (iii) augmented flow of the subject portion of the Potomac River resulting from releases (for whatever purpose) from existing upstream reservoirs, including Bloomington Lake and Savage Lake and from the proposed Little Seneca Lake when completed and operational."

ARTICLE 2.C. is modified by adding the following new paragraph:

"8. In April 1990 and in April of each fifth year thereafter during such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the

District, the Authority, and the Commission providing for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the Aqueduct, the District, the Authority, and the Commission shall review and evaluate the adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding twenty year period. If as a result of any such review and evaluation it is determined that additional water supplies will be required to meet the expected demands, the Aqueduct, the District, the Authority, and the Commission shall undertake negotiations to provide the required additional water supplies and, when provided, water from such additional water supplies shall be included as water subject to the allocation formula under the terms of this Agreement."

ARTICLE 3.E. is modified by adding the following paragraphs at the end thereof:

"During such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the District, the Authority, and the Commission providing for the regional management of all of their water supply facilities for the benefit of the Washington Metropolitan Area and the proposed Little Seneca Lake has been constructed and is operational, the foregoing paragraph shall be inoperative and the following paragraph shall become operative.

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Any community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which includes the low flow allocation formula and such other provisions as are necessary to effect the purposes of this Agreement. Any such community or entity may apply for permits necessary to build water intake structures or to appropriate water, and such permits shall be processed in accordance with the rules and regulations of the permit-issuing agency, notwithstanding the pendency of negotiations or litigation pursuant to Section 2.C.3."

ADOPTION BY GOVERNING PARTIES

At a meeting held on the 15th day of April 1982, and by subsequent correspondence and telephone polling, representatives of the governing parties unanimously recommended adoption of the foregoing Modification No. 1 of the Potomac River Low Flow Allocation Agreement, dated as of January 11, 1978, and the same is hereby agreed to and adopted by the governing parties as of the dates indicated opposite their signatures.

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Witness the following signatures:

ATTEST:

/s/ _____

22 JUL 1982
(Date)

THE UNITED STATES OF AMERICA

BY /s/ _____
Secretary of the Army

/s/ _____
Chief of Engineers

THE STATE OF MARYLAND

/s/ _____

22 JUL 1982
(Date)

BY /s/ _____
Governor

/s/ _____
Secretary of Natural Resources

THE COMMONWEALTH OF VIRGINIA

/s/ _____

22 JUL 1982
(Date)

BY /s/ _____
Governor

/s/ _____
Chairman, State Water Control Board

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THE DISTRICT OF COLUMBIA

/s/ _____ BY /s/ _____
Mayor

22 JUL 1982 /s/ _____
(Date) Director, Department of Environmental Services

APPENDIX G — WATER SUPPLY COORDINATION AGREEMENT OF 1982

WATER SUPPLY COORDINATION AGREEMENT

THIS AGREEMENT, dated for convenience of reference as the 22 day of July, 1982, made and entered into by and among the UNITED STATES OF AMERICA acting through the Baltimore District, Corps of Engineers, U.S. Army, functioning through the Washington Aqueduct Division (hereinafter called the "Aqueduct"); the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called the "Authority"); the WASHINGTON SUBURBAN SANITARY COMMISSION (hereinafter called the "Commission"); the DISTRICT OF COLUMBIA (hereinafter called the "District"); and the INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC (hereinafter called the "CO-OP").

WITNESSETH

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Federal Government situated in the District and its environs, and of providing a public water supply for the inhabitants of the District, and certain communities in northern Virginia; and

WHEREAS, the Authority is an authority established pursuant to the laws of the Commonwealth of Virginia charged with responsibility for providing a safe and adequate

public water supply within certain geographic areas of northern Virginia, and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission is a public authority established pursuant to the laws of Maryland, is charged with the responsibility of providing a safe and adequate water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the District is authorized and empowered to contract to provide a safe and adequate water supply to the inhabitants and entities within its jurisdiction and accomplishes this purpose through cooperation with the Washington Aqueduct Division, Corps of Engineers, United States Army, and is also authorized to contract for the purposes described herein, and

WHEREAS, the Interstate Commission on the Potomac River Basin (ICPRB) has created CO-OP devoted to forecasting demand and supply in the Washington Metropolitan Area; and

WHEREAS, CO-OP has developed a program for optimal utilization of all available water supply facilities in the Washington Metropolitan Area, particularly during drought periods; and

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WHEREAS, the Aqueduct, the Authority, and the Commission (hereinafter called the "suppliers") now have in place, on the Potomac River, water intakes installed in accordance with appropriate Federal and state laws; and

WHEREAS, the suppliers are governed by the provisions of the Potomac River Low Flow Allocation Agreement, dated January 11, 1978, which is hereby incorporated by reference into this agreement and made part thereof; and

WHEREAS, it is in the mutual benefit of the suppliers to manage Potomac River flows, reservoir releases, and water supply withdrawals so as to reduce or eliminate the possibility that the Emergency Stage of the Low Flow Allocation Agreement will ever be reached or that the allocation formula set forth therein becomes operative.

NOW, THEREFORE, in consideration of the mutual covenants herein contained the parties hereto do hereby agree as follows:

ARTICLE 1. — The suppliers agree to operate their respective water supply systems in a coordinated manner so as to provide the optimal utilization of all available water supply facilities for the benefit of the inhabitants of the Washington Metropolitan Area.

ARTICLE 2. — The Authority and the Commission agree to operate their non-Potomac water supplies (Occoquan River and Patuxent River) so as to maximize the availability of reservoir storage associated therewith for use during periods of low flows in the Potomac River.

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ARTICLE 3. — The District, the Authority, and the Commission agree that, notwithstanding the extent to which they each may participate in the cost of construction, operation and maintenance of Bloomington Lake, and the proposed Little Seneca Lake and in the operation and maintenance costs of the Savage Reservoir, releases of water from Bloomington Lake water supply storage and Little Seneca Lake shall be made as provided by this agreement.

ARTICLE 4. — The suppliers agree that all available water supply facilities shall be managed and operated as provided in the attached Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers (hereinafter called the "Operations Manual"), which manual is hereby made part of this agreement.

ARTICLE 5a. — CO-OP agrees to provide the administrative, technical, supervisory and managerial services set forth in the attached Operations Manual and the District, the Authority, and the Commission agree to pay the costs thereof in the following proportions: District-30%, Authority-20% and Commission-50%.

ARTICLE 5b. — The District shall take all necessary actions to procure the required appropriations to meet its cost sharing obligations hereunder; provided, however, that no payments shall be made by the District until appropriations for such purposes have been made pursuant to the requirements of the Budget and Accounting (Anti-Deficiency) Act of 1921 (31 U.S.C. 665) as amended.

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ARTICLE 6. — The parties agree that the services to be provided by CO-OP may be terminated at any time either by the unanimous agreement of the District, the Authority and the Commission or by CO-OP, in which event CO-OP shall deliver to the suppliers all computer hardware and software, equipment, supplies, records, etc., which may have been acquired or developed at the expense of the District, the Authority, and the Commission and thereupon the suppliers shall make appropriate arrangements for continuing the functions, duties and responsibilities theretofore performed by CO-OP. The District, the Authority and the Commission agree to pay necessary termination expenses incurred by CO-OP.

ARTICLE 7. — The suppliers do hereby establish an Operations Committee which shall comprise a representative of each supplier. The Committee shall be responsible for overseeing implementation of this agreement and the Operations Manual and shall be empowered, upon unanimous agreement, to revise the Operations Manual as circumstances may require. The Operations Committee shall:

(a) as necessary, review decisions of the Director of CO-OP and by unanimous agreement, change such decisions and so inform the Director of CO-OP,

(b) monitor compliance with the terms of this agreement and the Operations Manual,

(c) provide executive support to the Director of CO-OP within their agencies,

(d) approve expenditures of CO-OP relevant to the terms of this agreement,

(e) establish joint and coordinated operating procedures for use by the suppliers to monitor supply (including rainfall forecasts) and demand during emergencies and droughts, and

(f) establish CO-OP as the agency responsible for executing the procedures in 7 (e) above and for the establishment and maintenance of a system for monitoring supply and demand and performing drought management analysis.

ARTICLE 8. — The consideration for this agreement is the promises herein exchanged based upon the premises above mentioned and the public and governmental interests deemed necessary and desirable by the parties to this agreement.

ARTICLE 9. — It is agreed that the waters released from Bloomington Lake water supply storage and Little Seneca Lake are to be utilized to achieve the objectives of this agreement without regard to any cost-sharing by the District, the Authority, and the Commission in Bloomington Reservoir and Little Seneca Lake.

ARTICLE 10. — In April 1990 and in April of each fifth year thereafter during such time as this agreement is in effect and the proposed Little Seneca Lake has been constructed and is operational, the Aqueduct, the Authority, the Commission and the District shall review and evaluate the

adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding twenty year period. If as a result of any such review and evaluation it is determined that additional water supplies will be required to meet the expected demands, the Aqueduct, the Authority, the Commission and the District shall undertake negotiations to provide the required additional water supplies and, when provided, water from such additional water supplies shall be included as water subject to the allocation formula under the terms of the Potomac River Low Flow Allocation Agreement. Such facilities shall be operated under the terms of this agreement. The District, the Authority, and the Commission agree that the costs of construction, operation and maintenance of such additional water supplies shall be shared among these parties in accordance with the following formulae:

$$\text{District's Share } -\%= \frac{(A-B)}{(A-B)+(C-D)+(E-F)} \times 100$$

$$\text{Authority's Share } -\%= \frac{(C-D)}{(A-B)+(C-D)+(E-F)} \times 100$$

$$\text{Commission's Share } -\%= \frac{(E-F)}{(A-B)+(C-D)+(E-F)} \times 100$$

Where:

A = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during

the month of July in each of the five (5) years immediately preceding the award of a contract(s) for the construction of the additional water supply facilities.

B = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during the month of July in each of the years 1981 through 1985.

C = Same as A, except substitute the number of gallons of processed water pumped daily by the Authority.

D = Same as B, except substitute the number of gallons of processed water pumped daily by the Authority.

E = Same as A, except substitute the number of gallons of processed water pumped daily by the Commission.

F = Same as B, except substitute the number of gallons of processed water pumped daily by the Commission.

Whenever application of the above formulae results in a negative amount for any one of these parties, such party's share of the costs shall be zero. Thereupon, the formulae applicable to the other two parties shall be revised by eliminating therefrom the term which relates to the party with zero cost share (e.g., if the District's share is zero, the term (A-B) shall be eliminated; if the Authority's share is zero, the term (C-D) shall be eliminated; and if the Commission's share is zero, the term (E-F) shall be eliminated) and the revised formulae shall be applied to

determine the respective shares of costs to be borne by the other two parties. Whenever application of the above formulae results in negative amounts for any two of these parties, their respective shares of the costs shall be zero and the entire costs shall be borne by the third party.

ARTICLE 11. — The suppliers, the District and CO-OP agree to utilize their best efforts to resolve any disputes which arise under this agreement or the Operations Manual by informal negotiation, the resolution of which shall require unanimous agreement of the suppliers, and the District. However, any party may initiate litigation, the purpose of which is to construe a provision of or resolve a dispute that arises under this agreement or the Operations Manual. The parties to this agreement hereby agree the issues to be litigated may be litigated in any court of competent jurisdiction sitting in Maryland, Virginia, or the District of Columbia and consent to venue in any such court and to the service of all papers and pleadings related thereto. Pending final resolution of any dispute, the provisions of this agreement and the Operations Manual shall continue in effect.

ARTICLE 12. — The effective date of this agreement shall be the date on which the last party executes the same.

ARTICLE 13. — Unless sooner terminated by unanimous agreement of the suppliers, and the District, this agreement shall continue in effect for as long as the water systems of the suppliers remain in existence and operation.

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date which appears with their respective signatures.

Approved in form and in legal sufficiency:

/s/ _____

Date: 22 July 1982

UNITED STATES OF AMERICA

By: /s/ _____
District Engineer,
Baltimore District,
Corps of Engineers,
U.S. Army

Date: 22 July 1982

FAIRFAX COUNTY WATER AUTHORITY

/s/ _____

Date: 22 July 1982

By: /s/ _____
Chairman

Date: 22 July '82

WASHINGTON SUBURBAN SANITARY COMMISSION

/s/ _____

Date: 22 July 1982

By: /s/ _____
General Manager

Date: 22 Jul 82

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THE DISTRICT OF COLUMBIA

/s/ _____ BY /s/ _____
Mayor

Date: _____ Date: 7-22-82

INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC

/s/ _____ BY /s/ _____

Date: July 22, 1982 Date: July 22, 1982

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Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers

(Attachment to Water Supply Coordination Agreement, dated July 22, 1982)

I. Introduction

This manual details operations rules and procedures for reducing the impacts of severe droughts in the Potomac River Basin. Although the primary emphasis is on water supply for the Washington Metropolitan Area, the rules and procedures are consistent with maintaining instream flow and water quality in both upstream and downstream portions of the basin.

II. Objectives

A. Make the most efficient use of all water supply facilities, including but not limited to the Potomac River, Bloomington Lake, Occoquan Reservoir, Triadelphia Reservoir, Duckett Reservoir, and the proposed Little Seneca Lake to meet all water supply needs for the Washington Metropolitan Area.

B. Maintain the probability of invoking the Restriction Stage of the Potomac River Low Flow Allocation Agreement at less than 5 percent during a repeat of the historical streamflow record.

C. Maintain the probability of entering the Emergency Stage of the Potomac River Low Flow Allocation

Agreement at less than 2 percent with full reservoirs on June 1 of any year.

D. Maintain the probability of not refilling any reservoir used for Washington Metropolitan Area water supply to 90 percent of useable capacity by the following June 1 at less 5 percent during a repeat of the historical streamflow record.

E. Maintain flows in the Potomac River below Seneca Pool as agreed to by the signatories to the Potomac River Low Flow Allocation Agreement.

F. Minimize conflict between normal utility operations and drought operations.

G. Provide consistency with the requirements of the Potomac River Low Flow Allocation Agreement.

III. Facilities and Operations Directly Affected.

A. Potomac River facilities of the Washington Aqueduct Division, U.S. Army Corps of Engineers, Washington Suburban Sanitary Commission, and the Fairfax County Water Authority.

B. Washington Suburban Sanitary Commission water supply facilities on the Patuxent River.

C. Fairfax County Water Authority water supply and power generating facilities on the Occoquan River.

D. Finished water interconnections between the Fairfax County Water Authority and the Washington Aqueduct Division, U.S. Army Corps of Engineers supplied water utilities in Virginia, subject to the approval of Arlington County and/or the City of Falls Church.

E. Water supply releases from the proposed Little Seneca Lake.

F. Water supply releases from water supply storage in Bloomington Lake.

IV. Implementation

A. Whenever gauged flows at Point of Rocks are below 2000 cfs, CO-OP will compute flows in the Potomac River at Little Falls Dam, including all prior water supply withdrawals for the Washington Metropolitan Area on a daily basis.

B. CO-OP will issue long-range water supply outlooks on a monthly basis from May through October. Additional outlooks will be issued as needed. These outlooks will contain estimates of the probability of meeting long-range unrestricted demands from current storage, and then refilling every reservoir to at least 90 percent of useable capacity by the following June 1.

When computing probabilities, CO-OP shall consider gross storage in all local reservoirs, less

the following allowances for unuseable storage: a) Occoquan — 1 billion gallons; b) Patuxent (Triadelphia plus Duckett) — 2 billion gallons; and c) Little Seneca Lake — .5 billion gallons.

C. The rules set forth in Section V. shall take effect when one or both of the following conditions exist.

1. The probability of meeting all unrestricted demands and refilling all reservoirs to 90 percent of useable capacity by the following June 1 is less then 98 percent.

2. Flow in the Potomac as computed in IV-A above, less the amount required for flow-by over Little Falls Dam is projected to be less than twice the projected withdrawals for any of the next five days.

V. Operating Rules

A. During such time as the rules are in effect (per IV-C above) each supplier shall report daily to CO-OP, no later than 8:30 A.M., its 24 hour demand ending at 6:00 A.M. on that day.

B. During such times as these rules are in effect, the Director of CO-OP shall, following the objectives outlined in II above, and using techniques approved by the Operations Committee:

(1) Consult with the suppliers and the U.S. Army Corps of Engineers as required and direct the appropriate releases from water supply storage in Bloomington Lake and Little Seneca Lake.

(2) Prior to 10:00 A.M. daily set withdrawal rates from the Potomac for the Authority and the Commission for the 24 hour period beginning at 6:00 A.M. on that day.

C. As early as practicable during each day, the Director of CO-OP shall revise the Authority's and the Commission's Potomac withdrawal rates in light of actual river flow and water demands.

D. Whenever the Aqueduct declares the Restriction or Emergency Stage of the Potomac River Low Flow Allocation Agreement to be in effect, the allocation provisions of the Potomac River Low Flow Allocation Agreement shall determine Potomac withdrawals.

E. During such times as these rules are in effect power generation at the Occoquan River shall cease.

F. Should the probability of meeting unrestricted demand with existing storage fall below 95 percent, each supplier agrees to so advise the governing bodies of the jurisdictions which they serve and to recommend restrictions on water use.

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G. Raw water released from Lake Manassas and reimpounded in the Occoquan Reservoir shall be treated as Occoquan storage under these rules.

VI. Review by Operations Committee

A. The Operations Committee shall be responsible for overseeing the administration and implementation of this manual and, by unanimous agreement, shall be empowered to overrule or modify any action taken, or proposed to be taken, hereunder by the Director of CO-OP.

APPENDIX H — LETTER FROM BRUCE F. WILLIAMS TO MARTIN B. SULTAN DATED JANUARY 31, 1997

[Letterhead of Department of the Army]

January 31, 1997

Mr. Martin B. Sultan
Fairfax County Water Authority
8560 Arlington Boulevard
P. O. Box 1500
Merrifield, Virginia 22116-0185

Dear Mr. Sultan:

This is in reference to your permit application for Department of the Army authorization to construct a new intake structure located in the river extending channelward about 725 feet from the Virginia shoreline, a 10-foot diameter concrete pipe extending from the new intake to the existing intake, a connection to the existing intake, a clean-out shaft, and approximately 3200 feet of 9-foot diameter pipeline extending from the existing intake to the existing raw water pumping station. The project is located on the Potomac River, north of Lowes Island and approximately 2000 feet upstream of the Seneca Dam, in Loudoun County, Virginia and Montgomery County, Maryland.

After evaluating your application, we have determined that it qualifies for our Abbreviated Standard Permit 92-ASP-18 for activities of minimal environmental consequence. Provided your project adheres to the proposal you submitted

on December 16, 1996, the conditions of the abbreviated standard permit (enclosure) and the following special conditions, no further authorization will be required from this office:

1. Construction of the mid-river intake will use the "velocity cap" intake design to reduce impacts to juvenile fish;

2. Blasting of the river bed will not occur between March 1 and June 15 of any year to minimize impacts to fish during the breeding period;

3. A silt curtain will be utilized to reduce sedimentation impacts.

4. Non-erodible materials should be used, as practicable, in construction and stabilization of the temporary construction berm. All materials placed temporarily will be removed and the area restored to pre-project contours upon completion of the project.

If you should decide to change any aspect of your proposal, you must first apply for and be granted a permit modification. Your authorization to perform work under this regional permit expires on September 10, 1997.

Before you begin work, you should obtain all required State and local authorizations.

The party performing the work authorized by this permit will have a copy of this letter and the enclosed documents

with them at the project site during construction. These documents will be made available to any Corps representative upon their request.

Sincerely,

/s/
Bruce F. Williams
Chief, Northern Virginia
Regulatory Section

Enclosures

Copies Furnished:

Virginia Marine Resources Commission, Newport News
Virginia Department of Environmental Quality, Woodbridge
U.S. Fish and Wildlife Service, White Marsh
Environmental Protection Agency, Philadelphia
National Marine Fisheries Service, Oxford

APPENDIX I — LETTER FROM DEL. HELLER TO SEC. NISHIDA DATED MAY 8, 1997

HOUSE OF DELEGATES
Annapolis, Maryland 21401-1991

May 8, 1997

Ms. Jane Nishida
Secretary
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Dear Secretary Nishida:

Enclosed is a letter I received from my constituent's Mr. and Mrs. West, regarding the Fairfax County Water Authority Mid-River Intake project. As outlined in their letter they have grave concerns regarding this project.

In order to assist the West's, I am requesting that you review their letter and provide me with an explanation so that I may respond to them. In addition to the environmental concerns, I am also interested in why the State of Maryland would be establishing a less restrictive building environment on the Virginia side of the river for competition against Maryland builders in Montgomery and Frederick Counties.

I look forward to your response. If I can be of assistance, please feel free to contact me at any time.

Sincerely,

Henry B. Heller

Enclosure

APPENDIX J — LETTER FROM DEL. CRYOR TO SEC. NISHIDA DATED MAY 19, 1997

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND

JEAN B. CRYOR
May 19, 1997

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

Dear Secretary Nishida:

As you know, on Wednesday, May 21, in Montgomery County, the Maryland Department of Environment is holding a hearing regarding a request by Fairfax County, Virginia, to install a new water intake pipe in the Potomac River. The pipe is to be located near Seneca. Presently, Virginia draws its river water using a shore line pipe. The new pipe will be in the middle of the river. It will be capable of taking at lease double the amount of water presently removed. The new pipe does not automatically remove usage of the shore line pipe.

In April, I was contacted about the new pipe by a Montgomery County high school teacher with a strong interest in the environment. Upon hearing from Mr. John Mathwin, I contacted the Department of Environment. The staff of the department has been most courteous and responsive and agreed to schedule a hearing. As I said to you when we spoke on Friday, May 16, I am concerned about

the pipe and its impact on the environment as well as my concerns about the river being used as a resource for Virginia's continuing economic development.

It has become clear to me that Virginia's planners regard the Potomac River as key to their burgeoning development. Maryland has taken a view, particularly regarding the enlightened Smart Growth plan, to team economic development and careful environmental planning. However, Virginia does not appear to have the same thoughtful view. As Virginia continues to develop and build in the northern part of the Commonwealth, we in Maryland, I believe, will continue to experience tremendous pressure, both for jobs and for changing our own protective environmental stand.

It appears time for Maryland to look at the Potomac River and its place in the growing regional economy. Do we want to continue to exploit the river for the sake of Virginia's development?

I have asked for a meeting with Governor Glendening to discuss the river.

All my best,

Jean Cryor

APPENDIX K — LETTER FROM VIRGINIA COMMISSIONER OF HEALTH RANDOLPH GORDON TO CHARLIE CROWDER DATED OCTOBER 29, 1997

COMMONWEALTH OF VIRGINIA
Department of Health
P.O. Box 2448
Richmond, VA 23218

October 29, 1997

Mr. Charlie C. Crowder, Jr.
General Manager
Fairfax County Water Authority
8560 Arlington Boulevard
Merrifield, Virginia 22116-0815

Dear Mr. Crowder:

SUBJECT: Potomac Mid-River Intake

This letter is to confirm our position on the proposed mid-river intake on the Potomac River with respect to water quality and public health. It has long been the policy of the Virginia Department of Health that each waterworks use the best quality raw water source available. In fact, both the Virginia and national drinking water regulations are predicated on this assumption.

The use of a mid-river raw water intake has many water quality and public health advantages over the continued use of the existing shoreline intake. Of particular importance, is the inescapable fact that the water near the center of such a large river is not nearly as susceptible to shoreline sources of contamination. These contamination sources include

everything from urban and agricultural storm runoff to accidental discharges from such occurrences as pipeline breaks or vehicle accidents. The water at mid-river will also be of more consistent quality making it easier and more economic to treat. With our growing concern about treatment resistant pathogenic organisms such as Giardia and Cryptosporidium, it is even more critical that the best quality water sources be used.

We, at the Virginia Department of Health, consider the move to a mid-river water intake to be an essential public health initiative for the more than one million Virginians and their visitors who use Fairfax County Water Authority drinking water on a daily basis. We commend the FCWA for its insight in identifying such a simple solution to the increasingly complex problem of providing the safest possible drinking water to its customers.

Sincerely,

Randolph L. Gordon, M.D., M.P.H.
Commissioner

APPENDIX L — LETTER FROM J.L. HEARN TO BRUCE F. WILLIAMS DATED DECEMBER 10, 1997

[Letterhead of Maryland Department of the Environment]

December 10, 1997

Bruce F. Williams
Chief, Northern Virginia Regulatory Section
Norfolk District
U.S. Army Corps of Engineers
Fort Norfolk, 803 Front Street
Norfolk, Virginia 23510-1096

Re: Fairfax County Water Authority
Potomac River Intake
Lowes Island, Virginia
Maryland Nontidal Wetlands and Waterways
Tracking Number 96-NT-0024/199661481

Dear Mr. Williams:

The Maryland Department of the Environment has considered all information submitted by the applicant, Fairfax County Water Authority, the public, and other agencies to reach a decision on the above referenced permit application to construct a 300 million gallon per day capacity intake approximately 600 to 725 feet into the Potomac River. Based on the evidence submitted, the Department believes the general public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake. The public need for a safe and adequate supply of drinking water may reasonably be accomplished using the existing intake on the Virginia shore of the Potomac

River. As an unneeded project, proceeding with construction would be viewed as a wasteful endeavor, therefore, the Department has denied authorization. This has prevented the Department from proceeding far enough in its review to arrive at an acceptable construction method. Since the need and value of the project has not been justified and a method of construction selected, the project *was not evaluated* for a water quality certificate under the federal 401 requirement for consistency with State water quality standards.

If you have any questions about the decision of the Department in this matter, please do not hesitate to contact me.

Sincerely,

/s/ J. L. Hearn
J. L. Hearn, Director
Water Management Administration

JLH:twc
cc: Charlie C. Crowder, Jr.

APPENDIX M — LETTER FROM GOVERNOR PARRIS GLENDENING TO JOHN MATHWIN DATED FEBRUARY 9, 1998

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

February 9, 1998

Mr. John Mathwin
13515 Crispin Way
Rockville MD 20853

Dear Mr. Mathwin:

Thank you for your letter regarding Fairfax County's proposal to construct a mid-river water intake on the Potomac River. I am pleased that the State of Maryland was able to address your concerns and protect this nationally important natural resource.

The State reached its decision to deny authorization of this project by considering all the information submitted by the Fairfax County Water Authority. Based on the evidence provided, I decided that the public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake.

Thank you again for your letter of support. If you have any further questions concerning this project, please contact Mr. J.L. Hearns, Director, Maryland Department of the Environment, Water Management Administration, at (410) 631-3567.

Appendix M

Sincerely,

/s/ Parris N. Glendening
Parris N. Glendening
Governor

cc: J.L. Hearns [sic], Director, Water Management Administration, Department of the Environment

APPENDIX N — STIPULATIONS OF THE PARTIES DATED OCTOBER 9, 1998

BEFORE NEILE FRIEDMAN
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE OF
ADMINISTRATIVE HEARINGS

OAH Case No.: 98-MDE-WMA-116-044

FAIRFAX COUNTY WATER AUTHORITY

v.

MARYLAND DEPARTMENT
OF THE ENVIRONMENT

STIPULATIONS OF THE PARTIES

The Maryland Department of Environment ("MDE") and the Fairfax County Water Authority (the "Authority"), by the signatures of their undersigned counsel of record, stipulate to the following matters for purposes of this contested case hearing and any appeal:

1. The Authority will agree to accept as a condition on the requested waterway construction permit a provision requiring that the proposed intake be constructed such that the top of the intake structure (with velocity cap) will be at least 3 ½ feet below the normal water elevation (180.8) of the Potomac River at the site of the proposed intake, and at least 2 ½ feet below the minimum water level elevation at historic low flow (179.5). MDE stipulates that the construction of the proposed intake, with this permit condition, will not have an adverse impact on aesthetic or

boating interests. This stipulation is based on the representation by the Maryland Department of Natural Resources that no markers or buoys are necessary under these circumstances and that the Authority, therefore, will not place such markers or buoys at the site of the proposed intake.

2. MDE agrees in this contested case hearing that the construction of the proposed offshore intake, together with a velocity cap approved by the U.S. Fish and Wildlife Service and the Army Corps of Engineers, will not have an adverse impact on Potomac River fisheries.

3. Should MDE issue a waterway construction permit for the proposed offshore intake, or be required by judicial action to issue such a permit, a water quality certification under section 401 of the Clean Water Act will be issued at the same time.

4. As provided for at COMAR 08.01.04.16, in this contested case hearing the Department bears the burden of going forward to establish a prima facie case as to the existence of grounds for the proposed denial, and the burden of persuasion that the permit should be denied.

5. As provided for at COMAR § 28.02.01.10, in this contested case hearing the parties may file requests for production for inspection or copying any file, memorandum, correspondence, document, object, or tangible thing relevant to the subject matter of the case and not privileged.

6. The document attached as "Attachment A" is a true and accurate copy of a note written by Matthew G. Pajerowski, Chief, Water Rights Division, WMA, MDE, to

Appendix N

Terrance W. Clark, Chief, Nontidal Wetlands and Waterways Division, WMA, MDE, dated October 3, 1997, and was attached to MDE's copy of the Authority's Supplemental Submission dated August 29, 1997.

7. The parties shall exchange their exhibit lists and copies of exhibits, premarked for identification, on or before Friday, November 13, 1998, by the close of business.

SO STIPULATED:

Dated: October 9, 1998

/s/ Adam Snyder
Adam D. Snyder
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL
DEPARTMENT OF THE
ENVIRONMENT
2500 Broening Highway
Baltimore, Maryland 21224
(410) 631-3000

Counsel for the Maryland
Department of Environment

/s/ Stuart A. Raphael
Michael C. Powell
GORDON, FEINBLATT,
ROTHMAN, HOFFBERGER
& HOLLANDER, LLC
The Garrett Building
233 East Redwood Street
Baltimore, MD 21202
(410) 576-4175

Stuart A. Raphael
Randolph W. Church
HUNTON & WILLIAMS
1751 Pinnacle Drive,
Suite 1700
McLean, Virginia 22207
(703) 714-7400

Counsel for Fairfax County
Water Authority

APPENDIX O — STIPULATION OF PARTIES CONCERNING SECTION 401 WATER QUALITY CERTIFICATION DATED NOVEMBER 1998

MARYLAND:

OFFICE OF ADMINISTRATIVE HEARINGS

BEFORE THE HON. NEILE FRIEDMAN
AN ADMINISTRATIVE LAW JUDGE
OF THE OFFICE OF
ADMINISTRATIVE HEARINGS
CASE NO. 98-MDE-WMA-116-044

IN THE MATTER OF

FAIRFAX COUNTY WATER AUTH./
POTOMAC RIVER INTAKE

STIPULATION OF PARTIES CONCERNING § 401 WATER QUALITY CERTIFICATION

The Maryland Department of Environment ("MDE") and the Fairfax County Water Authority (the "Authority") hereby stipulate that MDE's opportunity to review the Authority's application to construct an offshore intake with respect to the issuance of a water quality certification under section 401 of the Clean Water Act is deemed waived by operation of law, pursuant to 33 U.S.C. § 1341. Accordingly, the question of whether MDE should issue a water quality certification in connection with the offshore intake project is no longer at issue in this proceeding.

Appendix O

SO STIPULATED:

Date: 11/12/98

/s/ Adam Snyder
Adam D. Snyder, Esquire
OFFICE OF THE
ATTORNEY GENERAL
DEPARTMENT OF THE
ENVIRONMENT
2500 Broening Highway
Baltimore, Maryland 21224

Counsel for the Maryland
Department of Environment

Date: 11/11/98

/s/ Stuart A. Raphael
Stuart A. Raphael
Randolph W. Church
Kevin J. Finto
Hunton & Williams
1751 Pinnacle Drive,
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Michael C. Powell
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander, LLC
The Garrett Building
233 East Redwood Street
Baltimore MD 21202

Counsel for Fairfax County
Water Authority

APPENDIX P — OPINION OF FINAL DECISION MAKER DATED JUNE 7, 1999

BEFORE THE FINAL DECISION MAKER
FOR THE MARYLAND DEPARTMENT
OF THE ENVIRONMENT
CASE NO. 98-MDE-WMA-116-044

FAIRFAX COUNTY WATER AUTHORITY/
POTOMAC RIVER INTAKE

v.

MARYLAND DEPARTMENT OF THE
ENVIRONMENT'S WATER MANAGEMENT
ADMINISTRATION

OPINION OF THE FINAL DECISION MAKER

This matter came before the Maryland Department of the Environment (Department) on February 5, 1999, upon Exceptions filed by the Department's Water Management Administration (Administration) to the January 21, 1999 MEMORANDUM AND ORDER ON MOTION (proposed decision) of the Administrative Law Judge (ALJ) overruling a water construction permit denial issued by the Director of the Administration, J. L. Hearn (Director). The Fairfax County Water Authority (Authority) filed a Conditional Cross-Exception on or about February 15, 1999 requesting that the Final Decision Maker consider the Cross-Exception if the ALJ's proposed decision was modified or remanded back to the Office of Administrative Hearings (OAH). As set forth below, after hearing oral argument from both the

Administration and the Authority, I find the ALJ erred when she ruled that "need" was not an appropriate consideration in determining whether to grant a construction permit and subsequently overruled the Department's denial of a waterway construction permit, finding that the Department had not presented sufficient evidence to establish a prima facie case. Accordingly, this matter is remanded back to the ALJ for further consideration in accordance with the guidance provided herein.

STATEMENT OF THE CASE

On December 10, 1997, the Administration issued a Notice of Decision to the Authority denying the Authority's permit application number 96-NT-0024/199661481 (Notice of Decision). The permit application sought the Administration's approval of the Authority's construction of a new mid-river drinking water intake in the Potomac River. The new intake would be in addition to an existing intake that the Authority has in the Potomac River near the Virginia shoreline.

In the Notice of Decision, the Administration stated that based on the evidence submitted, "it believe[d] the general public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake." Specifically, the Administration indicated that the proposed construction project did not: provide for the greatest feasible utilization of waters of the State, adequately preserve public safety, and promote the general public welfare. For the above reasons, the Administration determined that the project was not necessary and therefore, was wasteful and

detrimental to the public interest. The Authority appealed the Administration's permit denial on December 23, 1997.

The request for a contested case hearing was transmitted to the Office of Administrative Hearings (OAH) on February 4, 1998 by Gary T. Setzer, Program Administrator of the Department's Wetlands and Waterways Program. A pre-hearing conference was held at the OAH on September 3, 1998 and, thereafter, each party filed pre-hearing Memoranda. The Administration's memorandum was filed on October 21, 1998 and the Authority also filed its memorandum on October 21, 1998. The ALJ filed her MEMORANDUM AND ORDER ON PREHEARING MOTION (Pre-hearing Order) on November 24, 1998. After considering the issues which she believed were raised in the Pre-Hearing Memoranda, the ALJ opined that the Administration was incorrectly interpreting the statute (Md. Code Annotated, Environment Article Section 5-507 (1996 rpl. vol.)) "to require applicants to demonstrate that their projects are necessary or have no practicable alternative." (Pre-hearing Order p. 4, 8). According, to the ALJ, the applicable construction permit regulation, COMAR 26.17.04.04, did not require an applicant to demonstrate that there is no practicable alternative to a proposed construction project. Therefore, the ALJ found that the Administration could not require the Authority to demonstrate that there were no practical alternatives to its proposed construction of a mid-river water intake. The ALJ further ruled that, "need is not an appropriate criteria for determination of construction eligibility, [and that] evidence related to [this] issue will not be relevant to this proceeding." (Pre-hearing Order p.9). The ALJ also found that undue political influence was not

relevant to the proceeding and did not grant the Authority's motion to compel documents.

The ALJ made no findings of fact or conclusions of law concerning the Authority's assertion that the permit should issue in accordance with the interstate Compact of 1785.

Following these rulings, a hearing on the merits was held at the OAH on December 3, 1998 and December 7, 1998. At the conclusion of the Administration's case, the Authority moved for Summary Disposition. The Authority's Motion was briefed and filed with the OAH on December 15, 1998. The Administration filed a response on December 22, 1998 and the Authority replied on January 4, 1999.

On January 21, 1999, the ALJ granted the Authority's Motion for Summary Disposition and overruled the Administration's denial of the water intake construction permit, holding that the Administration had failed to present sufficient evidence to establish a prima facie case that the permit was properly denied.

Thereafter, the Administration filed exceptions to the ALJ's proposed decision. The Administration's exceptions, filed on February 5, 1999, raise the following issues:

1) whether the ALJ erred when she ruled that the Administration's interpretation of Md., Code Annotated, Environment Article, Section 5-507 (1996 rpl. vol.) requiring a demonstration by the Authority that the proposed project was needed was legally impermissible;

2) whether the ALJ erred when she ruled that the Administration did not have authority to deny a waterway construction permit on the ground that practical alternatives exist that would achieve the Authority's stated purpose and which would have fewer environmental impacts;

3) whether the ALJ erred when she found that the Administration may not deny a waterway construction permit unless the proposed project would eliminate or significantly and adversely affect benthic or any other habitat or related flora or fauna;

4) whether the ALJ erred when she found that the Administration had not provided evidence that the proposed water intake would impede the flow of a scenic and wild river;

5) whether the ALJ erred in finding that the Administration could not consider the environmental impacts of operating a water intake project, as opposed to just constructing it, in denying a waterway construction permit; and

6) whether the ALJ erred in finding that the Administration did not prove that the construction of the proposed water intake would cause the environmental impacts urged by the Administration or that those environmental impacts would be detrimental to the public interest under Md. Code Annotated, Environment Article, Section 5-507 (1996 rpl. vol.).

Appendix P

The Authority filed a CONDITIONAL CROSS-EXCEPTION on February 15, 1999. The conditional cross-exception concerned: whether the ALJ erred in failing to compel the production of internal departmental documents and whether the Administration had properly denied the Authority's construction permit.

The Department filed a RESPONSE TO THE CONDITIONAL CROSS-EXCEPTION OF THE FAIRFAX COUNTY WATER AUTHORITY on March 22, 1999.

Oral argument on the exceptions was held on April 30, 1999. The parties were informed prior to each presentation, that this Opinion would be based only on the evidence presented at the December 3 and 7, 1998 hearing at the Office of Administrative Hearings. The Affidavit of Terrance W. Clark, which was attached to the Administration's Exceptions to the Proposed Decision, was not considered. In accordance with the requirements of the Administrative Procedure Act, Md., Code Annotated, State Government Article, Section 10-201, *et seq.* (1995 rpl. vol.), my findings of fact, conclusions of law, decision on the Administration's exceptions and the Authority's cross-exceptions follow.

FINDINGS OF FACT

Although both written and some oral stipulations between the parties were entered, at the hearings on December 3 and December 7, 1998, in her proposed opinion the ALJ did not make any specific factual findings in this case. This is contrary to both Maryland law and various regulations that require such findings to be made.

Specifically, Md. Code Annotated, State Government Article, Section 10-220(a) (1995 rpl. vol.) states that, "If the Office conducts a hearing under this subtitle, the Office *shall* prepare proposed findings of fact . . ." Similarly, COMAR 26.01.02.31(C) states, "A . . . proposed decision shall be prepared in writing by the hearing examiner and *shall* contain findings of fact . . ." See also COMAR 08.01.04.22(B) regarding proposed decisions which states, "A decision on the merits of a case shall be in writing and *shall* include findings of fact . . . Findings of fact shall consist of the underlying facts of record to support the decision."

The record created at the evidentiary hearing did not resolve many factual issues because of the ALJ's pre-emptive Pre-Hearing ruling that evidence of "need" for the proposed intake structure was irrelevant to the proceeding. The ALJ's sweeping Pre-hearing Order precluded the introduction of relevant evidence. Much of the evidence considered by the Administration never came before the ALJ. Although some of the evidence that the parties sought to introduce might have been irrelevant, other excluded evidence was relevant. Without this evidence it is impossible to make the factual findings required to resolve this matter.

Of particular significance is that the ALJ made no findings of fact pertaining to the construction permit at issue. Principally, if the Administration is ordered to grant the permit, the factual questions of how long the intake pipe should be, what the diameter of the pipe should be, and the construction method, remain unresolved. The ALJ declined in her Order to deal with these questions and in its present state the record provides no guidance.

Appendix P

For these reasons, this portion of my Opinion cannot disclose any factual findings, except for those facts that were stipulated by the parties and what few findings of fact that could be extracted from the record:

1. On December 10, 1997, the Maryland Department of Environment's Water Management Administration denied Fairfax County Water Authority's permit application for an offshore drinking water intake in the Potomac River. (Notice of Decision)

2. The Administration's denial of the construction permit was supported by the following reasons:

   a. Historical operating records indicate that the existing water intake structure is adequate to provide safe and reliable water to meet the needs of the Fairfax County Water Authority service area. On average, water quality problems in the River have only required the intake valve to be turned off for several hours on average of less than two days per year and that treated water quality has not been impacted.

   b. The applicant has not sufficiently demonstrated that water in mid-river is significantly improved in quality to the extent that it would have a measurable benefit for the reduction of risk associated with *Cryptosporidium* and *Giardia*.

   c. Based on a variety of ongoing watershed management and pollution control efforts by the

Commonwealth of Virginia and local governments, it is reasonable to expect that water quality will improve in the area of the existing water intake and that this project would not be necessary. This is especially true with regard to the federal requirement that Virginia develop appropriate TMDLs to assure fishable and swimmable waters.

d. Insufficient justification was provided to support the need to construct a 600-725 foot new intake structure. In fact, information submitted as part of the application indicates that, should this type of structure ever be needed, a project considerably shorter in length (approximately 300-400 feet) would be more than adequate.

e. The proposed capacity of the 300 mgd is not supported by the existing and projected use. An intake of lower capacity could be operated in conjunction with the existing intake structure to meet the demands of the system.

f. The application did not provide sufficient documentation to allow the Department of Natural Resources to determine that the project meets the intent of the State Scenic and Wild Rivers Act. Specifically, evidence was not provided in the application which demonstrates that the project enhances water quality, promotes wise use of the resource, and protects the outstanding scenic value of the Potomac River.

g. The project is at best premature as to need based on existing long-term water allocation agreements in the watershed and does not adequately take into consideration ongoing efforts to improve water quality in the Potomac Basin. The pending U.S. Geological Survey Potomac River NAWQA results, the Interstate Commission on the Potomac River Basin basinwide water study, and the American Heritage River designation will provide information about basinwide water quality and quantity that could affect the accuracy of supply and demand projections. (Notice of Decision)

3. The portion of the Potomac River between Frederick County and Montgomery County is designated as a scenic river under the State's Wild and Scenic Rivers Act. T. 209-210.

4. A scenic river designation means that the free flowing state of a river is protected and that the shore of the river would be relatively undeveloped. T.209-210.

5. The Potomac River is also designated as an American Heritage River. T. 210, 235.

6. The American Heritage designation does not affect the regulation of construction in the Potomac River. T. 235.

7. The Authority's proposed intake would be located in that portion of the Potomac River known as the

Seneca Pool, which is located from Points of Rock to Chain Bridge. T. 144.

8. The Seneca Pool is a significant recreational area in the Washington Metropolitan Area for activities such as swimming, boating and fishing. (T. 144; State's Ex. 39.)

9. The Authority requested a construction permit for a mid-river intake with a 725 foot pipe, but the Authority will consider a reduced pipeline of 600 feet. (T. 146; Joint Ex. 161.)

DISCUSSION

The ALJ's proposed decision granted the Authority's Motion for Summary Disposition on the basis that the Department had not presented a prima facie case justifying denial of the permit application. In reaching this conclusion, the ALJ relied on her Pre-hearing Order, which addressed preliminary motions filed by the parties and the admissibility of certain evidence. She ruled that evidence presented concerning the "need" for the proposed project was not relevant. The ALJ's far-reaching pre-hearing ruling incorrectly confused the relevance of several discrete factual considerations under the single heading of "need."

Most notably, the ruling failed to distinguish evidence concerning the need for a specific *quantity* of water from evidence regarding water *quality*. The Authority argued in its pre-hearing brief (p.5) that the issue of whether a new intake would allow Virginia to take more than its fair share

of water was irrelevant because the quantity of water, to be drawn from the Potomac, was the subject of an extensive set of water use agreements. (pre-hearing brief p. 5-13.)

The Authority asserted that the adequacy of the future water supply for the Washington metropolitan area was not relevant in this proceeding (Authority brief pp. 5-13). That entire argument however revolved around the question of water quantity not the factual determination of what is causing the Authority's operational problems and whether the mid-river intake would fix those problems. Finally, even in arguing that the Department's interpretation of Md. Code Annotated, Environment Article Section 5-507 (1996 rpl. vol.) was incorrect the Authority did not contend that its need for an intake location which would provide the Authority with better water quality was irrelevant to the proceeding. The thrust of the argument was that by requiring the applicant to demonstrate "need," the Department had improperly shifted the burden of persuasion to the applicant.

While, the ALJ may have properly excluded evidence as it related to water quantity, she went too far when she also excluded the issues relating to water quality on the grounds of relevance. At issue are the advantages and disadvantages of the proposed intake structure. In it's pre-hearing brief the Authority stated that it was prepared to present data and expert testimony to demonstrate that offshore water is significantly better than the water at its existing shore intake and will provide an additional barrier against waterborne pathogens. The Authority also asserted they had evidence indicating that the offshore intake will eliminate operational problems the Authority has with

clogging from trees, leaves, grass and ice. Furthermore the Authority was also prepared to present evidence that Virginia's sediment and erosion control policies are not the cause of the Authority's water quality and operational problems. (Authority brief p.3-4). Nowhere did the Authority suggest that these issues were irrelevant. The Authority simply argued that it would factually prevail on these issues.

Although water quantity is not an issue, water quality is relevant and important in understanding why the new intake structure is needed. Both sides were prepared to address this issue at the hearing but were prevented from doing this due to the Pre-hearing Order. (Authority Pre-hearing brief, pp.3-9: Department Pre-hearing brief, p 2).

The ALJ reasoned that although the Department framed the reasons for its denial as being relevant to the waterway construction permit at issue, in fact the reasons for the denial were based on criteria properly related to a water appropriation permit rather than a waterway construction permit. The ALJ stated:

> There is no basis in the applicable law which would support a conclusion that the criteria for the appropriation permit is legally permissible to use as the basis to deny a waterway construction permit. Therefore, I find that MDE failed to thoroughly address relevant issues when interpreting the statutory language and that the considerations utilized were not valid (Pre-hearing Order p.8).

Appendix P

The ALJ noted in the Pre-hearing Order that the Department originally sought to resolve the following factual issues at the hearing related to the "need" for the project:

> [1] whether quality of water at the site of the proposed mid-river intake is better than that at the current shore intake;
>
> [2] whether the water at the current shoreline intake presents a greater risk of Cryptosporidium than the water at the site of the proposed mid-river intake; and
>
> [3] whether improving sediment and erosion control and non-point source run-off in the Run and Broad Run watersheds would address the problems Fairfax County is experiencing at its current intake (Pre-hearing Order p.9).

The ALJ ruled that:

> Inasmuch as these issues concern the need for the proposed project, and as I have found that need is not an appropriate criteria for determination of construction permit eligibility, evidence related to these issues will not be relevant to this proceeding. (Pre-hearing Order p. 9).

As a result of her conclusion that "need" was not an appropriate criteria for determining eligibility for a waterway construction permit, the ALJ excluded all evidence relating to whether a new intake was needed to improve water quality. Rather than excluding all the evidence related to the

Authority's need for water of better quality, the ALJ should have allowed both parties an opportunity to introduce the evidence they felt they needed to establish their case. Then, if the evidence was objected to, the ALJ could rule on each piece of evidence, individually, as it was presented.

I. The "Need" for a Proposed Project is a Permissible and Relevant Consideration for Construction Permit Eligibility

The "need" for a proposed intake structure is relevant to the determination of whether or not to grant a waterway construction permit. The statute and applicable regulations demonstrate that the criteria for granting a waterway construction or appropriation permit are inextricably linked, Maryland Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) requires the Department "weigh all respective public advantages and disadvantages . . ." of a permit application to determine whether the, "applicant's plans provide greatest feasible utilization of the waters of the State . . ." regardless of whether the permit under consideration is a water appropriation or construction permit. The Department may reject either an appropriation or a construction permit application if it believes from the evidence that, "the proposed appropriation . . . or proposed construction is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest . . ." The statutory considerations for either type of permit are identical.

In interpreting a statute a reading of the plain language of the statute is the appropriate starting point. *Brown v.*

Brown, 119 Md. App. 289, 294, 705 A.2d 7 (1998). In this case Md. Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) provides that the Department must consider the advantages and disadvantages of a permit application as well as determining whether the applicant's plan provides for the greatest feasible utilization of the waters of the state, in determining whether to grant a construction or appropriations permit. The plain language of the statute also directs the Department to determine whether the applicant's proposed construction or appropriation is "inadequate" or "wasteful."

The ALJ's Pre-hearing Order improperly excluded evidence regarding water quality based on grounds of relevance. She determined that water quality concerned the need for the project, and "need" was not a permissible criteria in considering a request for a waterway construction permit. As a general rule, to be admissible, evidence must be relevant and material. *Kelly Catering, Inc. v. Holman*, 96 Md. App. 256, 271, 624 A.2d 1300 (1993), *cert. granted*, 332 Md. 480, 632 A.2d 446 (1993), *aff'd* 334 Md. 480, 639 A.2d 201 (1994). Evidence is material if it tends to establish a proposition that has legal significance to the litigation, and it is relevant if it is sufficiently probative of a proposition that, if established would have legal significance to the litigation. *Id.* at 271.

"Need" is a relevant consideration in determining whether the proposed construction constitutes "greatest feasible utilization of the waters of the State" or whether the proposed project is "inadequate" or "wasteful." Certainly the construction of unnecessary intake structures would be

wasteful simply because of the environmental disruption caused by the act of construction and the resources consumed to build them. The statute authorizes the Department to deny a construction permit application if the structure is wasteful.

Although the ALJ referred generally to COMAR 26.17.04.04, she did not specifically consider COMAR 26.17.04.04 B which expressly requires that construction permit applications, "shall include evidence of the benefits to be derived from the project." According to the regulation, "[t]his evidence shall be stated in monetary terms or, when more appropriate, other quantitative or qualitative terms."

Evidence regarding the need for a project tends to establish the project's benefits, the public interests served by the project, as well as advantages and disadvantages. A project which is not needed serves a diminished public interest, if any. Consequently, it is difficult to reconcile the ALJ's holding that "need" is not an appropriate criteria for determination of construction permit eligibility (Pre-hearing Order p.9) with the language of COMAR 26.17.04.11.A, which includes:

> As the basis for approval, denial, or modification of a [construction] permit, the Administration *shall weigh all public advantages and disadvantages*. The Administration shall grant the permit, if approval of the project is in the *best public interest* and the plans for the project provide the *greatest feasible utilization* of the waters of the State, adequately preserve the public safety, and promote the general public welfare. (emphasis added.)

Appendix P

COMAR 26.17.04.11A gives the Administration a broad discretion in determining whether to grant a construction permit. Despite the language of this regulation, the ALJ, in her proposed decision narrowly focuses her analysis on the seven general criteria of 26.17.04.11B as relevant considerations for permit eligibility.

COMAR 26.17.04.11B provides that:

B. General Criteria.

(1) In all cases where the proposed project is on a stream in the State Scenic and Wild Rivers program and, in the case of other streams, when necessary, the Administration shall advise the applicant of the outstanding scenic, fish, wildlife, and other recreation values to the citizens of the State. In these cases, the applicant shall consider alternatives less harmful to the stream's value as a scenic and wild resource. Construction of an impoundment upon a scenic or wild river is contrary, to the public interest, if that project floods an area of unusual beauty, blocks the access to the public of a view previously enjoyed, or alters the stream's wild qualities.

(2) A dam or other structure impeding the natural flow of a scenic and wild river may not be constructed, operated, or maintained in a scenic and wild river, and channelization may not be undertaken unless specifically approved. The Secretary's approval authority under Natural

Resources Article, §-406, is delegated to the Director of the Water Management Administration or the Director's designee. The Director or the designee shall consider the comments received from the Department of Natural Resources as well as the standards established in §B(1) of this regulation to protect the river's scenic and wild qualities.

(3) In the evaluation of permit applications, the Administration shall consider the blockage of free passage of fish to be contrary to the public interest, except as provided in Natural Resources Article, §4-502(d), Annotated Code of Maryland.

(4) Category II, III, or IV dams may not be built or allowed to impound water in any location where a failure is likely to result in the loss of human life or severe damage to streets, major roads, public utilities, or other high value property.

(5) Proposed projects that eliminate or significantly and adversely affect aquatic or terrestrial habitat and their related flora and fauna are not in the public interest. At a minimum, all in-stream construction shall be prohibited from October through April, inclusive, for natural trout waters and from March through May, inclusive, for recreational trout waters. In addition, the construction of proposed projects, which may adversely affect anadromous fish spawning

areas, shall be prohibited from March 15 through June 15, inclusive. For projects when there is no reasonable alternative to the adverse effects on nontidal wetlands or other aquatic or terrestrial habitat, the applicant shall be required to provide measures to mitigate, replace or minimize the loss of habitat.

(6) Proposed projects which increase the risk of flooding to other property, owners are prohibited, unless that area subject to additional risk of flooding is purchased, placed in designated flood easement, or addressed by other means acceptable to the Administration.

(7) The construction or substantial improvement of any residential, commercial or industrial structure in the 100-year frequency floodplain and below the water surface elevation of the 100-year frequency flood may not be permitted. Minor maintenance and repair may be permitted. In addition, the modifications of existing structures for flood-proofing purposes may be permitted. Flood-proofing modifications shall be designed and constructed in accordance with specifications approved by the Administration.

Of the seven general criteria, three are obviously inapplicable to water intake construction permits. General criteria number 4 only concerns category II, III, or IV dams. Criteria number 6 concerns projects which increase the risk of flooding to other property owners, and criteria number 7

concerns construction in the flood plain. This leaves only four criteria for the Department's Water Management Administration to consider.

Of the four remaining criteria:

— number 1 concerns the State Scenic and Wild Rivers Program, and requires that the applicant, "shall consider alternatives less harmful to the streams value as a scenic and wild resource."

— number 2 governs structures which impede the natural flow of a scenic and wild river,

— number 3 concerns blocking the free passage of fish, and

— number 5 deals with projects that eliminate or adversely impact aquatic or terrestrial habitat.

In light of the statutory and regulatory language requiring the Administration to weigh all public advantages and disadvantages of a proposed project, the ALJ's conclusion that these four criteria are the only permissible considerations, in determining whether to grant or deny a water intake construction permit, is unnecessarily restrictive. While the Administration must consider the listed criteria, I find nothing in the law which limits the Administration to considering only those criteria.

In the present case, the factual question of the relative water quality available from the shoreline as opposed to mid

stream, remains unresolved despite the fact that both the applicant and the Department submitted reams of evidence on the subject. The ALJ held that although the question of "need" would have been permissible and relevant to the Department's grant or denial of the water appropriation permit, it was not relevant to the grant or denial of the related intake structure construction permit.

II. Appropriation Permits and Construction Permits Involve Concurrent Considerations

The ALJ's decision is not supported by the relevant Maryland regulations. COMAR 26.17.06 et seq. governs water appropriation permits. COMAR 26.17.06.04 sets out the appropriation permit application procedures. Subsection A.(1) states that "an applicant may not build or operate a structure requiring a permit until the Department has issued the permit." Subsection A.(4)(e) also requires the application to include complete plans and specifications for any facility or structure requiring a permit. This regulation further requires the applicant to obtain both an appropriation and a construction permit. The regulations anticipate that both water appropriation and intake construction permit applications for the same project can be considered concurrently.

COMAR 26.17.04 governing construction permits and chapter .06 governing water appropriation permits are directly related to each other by COMAR 26.17.04.03 B which states:

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> If the construction, reconstruction, repair, or alteration of the proposed works is for the purpose of obtaining a new or increased supply of water for any use for which an appropriation permit is required by law or regulation, the applicant shall also apply to the Administration for this [i.e. waterway construction] permit. The Administration shall establish the order in which the applications may be considered or may require the applications to be submitted and considered concurrently.

This regulation clearly indicates when the purpose of the construction is to appropriate water, the Administration may consider both applications simultaneously. The language reiterates that for any water appropriation project the Department's consideration of the permit to construct is linked to the underlying appropriation permit. Furthermore, the regulation requires that an applicant who has a water appropriation permit must also seek a construction permit when the purpose of the construction is to obtain a new or increased supply of water. Once again, the purpose of the construction is inextricably linked to the water appropriation. If the water appropriation permit is not granted, the construction would be pointless.

In the present case, a water appropriation permit has already been granted. The question posed by the Pre-Hearing Order is whether evidence of "need" for the construction project is relevant to the Department's weighing of all public advantages and disadvantages associated with the construction of this particular water intake structure.

COMAR 26.17.04.04 requires that a construction application include evidence of the monetary, or when appropriate the quantitative or qualitative benefits to be derived from the project. Based on the language of Md. Code Annotated, Environment Article 5-507(a) (1996 rpl. vol.), COMAR 26.17.04 and 26.17.06 the Department may properly consider evidence pertaining to water quality.

III. No Practical Alternative

The ALJ properly held that neither the statute nor the regulations authorize the Department to impose a requirement that an applicant demonstrate the project has no practical alternative in order to obtain a construction permit. Although, COMAR 26.17.04.11.B.1 requires the applicant to consider alternatives less harmful to the stream's value as a scenic and wild resource, this consideration falls short of requiring the applicant to establish that there is no practical alternative to the entire project or risk denial of the permit. However, agreeing that the Authority and the ALJ were correct that the Department must carry the burden of persuasion and show that the proposed project is unnecessary, does not prevent the Department from presenting evidence to meet its burden of persuasion.

IV. The Authority's Conditional Cross-Exception

Prior to the hearing in this matter, the Authority sought discovery of the Department's internal documents that reflect the Administration's decision to deny the Authority's intake construction permit. The Authority claims that these internal documents reflect the undue political influence that was

brought to bear on the Administration's decision to deny the construction permit.

In her pretrial order of November 24, 1998, the ALJ found that possible evidence of undue influence is not relevant to determining whether the Department properly denied the Authority's permit application. The Authority claims that the information is relevant and requests that, if the ALJ's proposed decision is modified or remanded, I find that the ALJ's failure to compel production of the internal documents was in error.

In support of its conditional exception, the Authority enumerates several reasons why the internal documents are relevant. However, internal documents are covered by executive privilege, sometimes referred to as deliberative process privilege, and relevance alone does not determine whether internal documents should be disclosed. *Hamilton v. Verdow*, 287 Md. 544, 562, 414 A.2d 914 (1980). Instead, a balancing process must be undertaken that weighs the need for the public's interest in the confidentiality of government communications of a deliberative or advisory nature and a litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice. *Id.*, at 563. Also see, *Cranford v. Montgomery County*, 300 Md. 759, 481 A.2d 221 (1984) and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 952, 88 S.Ct. 334 (1967).

This analysis was not undertaken below. Hence, there is no evidence in the record that permits me to weigh the

competing interests of the State in protecting its ability to engage in frank expression and discussion among the Department's decision makers and the Authority's need for the documents in presenting its case to obtain its construction permit. Therefore, the issue of whether the Department should be compelled to produce the internal documents requested by the Authority is remanded to the Office of Administrative Hearings for an analysis and decision consistent with the authorities cited above.

V. CONCLUSION

The ALJ's Memorandum and Proposed Order dated January 21, 1999, although detailed and thoughtful, is flawed because the underlying factual basis relied on did not include evidence of "need." By excluding evidence of "need" the ALJ severely restricted the ability of both parties to submit evidence and argue their case. In its opening statement, the Authority continued to raise issues related to water quality. The ALJ repeatedly admonished the Authority not to raise the issue of "need" as she previously ruled it to be irrelevant in her Pre-hearing Order. Not allowing the evidence of "need" to be addressed at the hearing, ultimately effected the issues to be litigated, the interpretation of the law and finally the proposed decision of the ALJ.

With regard to the exceptions of the Department:

Exception #1: The ALJ erred in ruling that "MDE's interpretation of the waterway construction statue so as to require a demonstration of the need for the proposed project is not legally permissible.

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To the extent that the ALJ's ruling prevents the Department from considering and presenting evidence concerning the need for the project the Department's exception is granted.

> *Exception #2*: The ALJ erred in ruling that the Department did not have the authority to deny a waterway construction permit on the ground that there exist practicable alternatives to a project that will achieve the project's stated purpose and that will involve fewer environmental impacts.

To the extent that the ALJ's ruling on the Department's interpretation of the Md. Code Annotated, Environment Article, Section 5-507(a) (1996 rpl. vol.) prevents the Department from denying a construction permit simply because the applicants failed to demonstrate that a project lacks a practicable alternative, the Department's exception is denied.

> *Exceptions # 3, 4, 5 & 6*: Inasmuch as this matter is being remanded for further evidentiary hearing and MDE's third, fourth, fifth, and sixth exceptions concern either the sufficiency or the relevance of evidence presented at the hearing these exceptions are not reviewable at this time.

Upon consideration of the proposed decision, the Exceptions filed by the Maryland Department of the Environment's Water Management Administration and the Conditional Cross-Exception filed by Fairfax County Water Authority, the responses to the Exceptions and Conditional Cross-Exception and the record in this matter, and for the reasons stated above:

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I find, as a matter of law, that the Administration's requirement under Section 5-507 of the Environment Article that the Authority demonstrate that there is no practical alternative to its proposed water intake is legally impermissible.

I further find that the ALJ erred when she determined that the need for the intake was an impermissible consideration under Md. Code Annotated, Environment Article, Section 5-507. Both parties are entitled to put on evidence concerning the need for the proposed water intake construction.

In addition, if the ALJ finds that the permit should be granted, other factual issues still need to be addressed, such as, but not limited to: determining the appropriate size and length of the proposed intake, the diameter of the pipe, and the appropriate construction method of the proposed intake. The present record before me is incomplete and on remand these issues should be addressed.

ORDER

It is therefore, this 7th day of June, 1999, by Bernard A. Penner, Enforcement Compliance Coordinator, appointed by the Secretary of the Maryland Department of the Environment as the final decision maker in this matter, hereby

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ORDERED that the proposed decision issued by the Office of Administrative Hearings in this matter is reversed and is remanded to the Office of Administrative Hearings for further proceedings consistent with this opinion.

/s/ Bernard A. Penner
Bernard A. Penner,
Final Decision Maker
for The Maryland Department
of the Environment

NOTICE

In accordance with Section 10-222 of the State Government Article, the parties are *not* entitled to seek judicial review of this Order in the Circuit Court as it is not the Departments Final Administrative Decision. This Order *is not final* because it does not determine or conclude the rights of the parties nor does it deny the parties the means to further prosecute or defend their rights and interests in this matter. *See Maryland Commission on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 56-57 (1983).

APPENDIX Q — LETTER FROM FRED C. MORIN TO JANE T. NISHIDA DATED SEPTEMBER 23, 1999

FAIRFAX COUNTY WATER AUTHORITY

September 23, 1999

The Honorable Jane T. Nishida
Secretary, Maryland Department
of the Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Secretary Nishida:

Since January 1996 Fairfax County Water Authority has been seeking to find a basis upon which the Maryland Department of the Environment would agree to permit it to construct an off-shore intake in the Potomac River to supply water to the Authority's Corbalis Treatment Plant pursuant to an appropriation permit that Maryland has already granted.

The Authority does not need and does not wish to acquire a greater physical capability to withdraw water from the River than it already has. Its existing intake on the Virginia shore is large enough to allow it to take as much water as it can now see that it will ever need to take from the River. The Authority's counsel offered you personally a number of assurances in our meeting with you in Baltimore on November 24, 1998, to guarantee that the new intake would not be used to enlarge its withdrawal capability or as a wedge to gain more water at some time in the future. We asked, in

the event these assurances were not adequate, that you or your counsel suggest others that could be incorporated into any settlement agreement and made binding. Neither you nor your counsel has asked for any additional assurances, and subsequent to our meeting, both Judge Friedman and Bernard Penner (your appointed "final decision-maker") have stated that water quantity is not an issue that is relevant to the issuance of the permit that the Authority seeks. We assume the assurances that were offered are satisfactory.

The Authority desires to build the intake (1) to obtain cleaner raw water to treat in the interest of the public health, (2) to reduce or avoid serious operating problems associated with its existing intake that pose personal risks to its employees and could interrupt water service to over a million people, and (3) to save money for its customers.

The Authority has attempted to settle this case by non-binding mediation. After a settlement conference with a Maryland Administrative Law Judge in Hunt Valley on September 21 and September 22, 1998, we were hopeful that a basis for resolving this matter was at hand.

On June 2, 1999, in a meeting called for the sole purpose of discussing settlement between our counsel and J. L. Hearn and your counsel, Adam Snyder, in Baltimore, the Authority sought to find grounds of accommodation with Maryland. Our counsel specifically inquired if there was *any set of conditions or restrictions at all* upon which the Department of the Environment would even discuss the issuance of a permit. Subsequently, your counsel advised our counsel that MDE was unwilling to respond to any of the proposals made by the Authority and unwilling to suggest any basis whatsoever upon which a permit might be issued.

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To date MDE has refused to negotiate at all or to make any counter-proposal to any of the Authority's suggestions. The Authority, on the other hand, has unilaterally made significant modifications to its proposal. Most significantly, it has agreed to submerge the intake entirely to a depth that would be safe for recreational use and that would not require the presence of any buoys or other markers. If the new intake is sized for the ultimate capacity of the Corbalis Plant (300 mgd), it has agreed not to use its shore intake except in emergencies under the strict scrutiny and control of MDE.

The Authority is willing to consider additional modifications to its proposal to take into account the kind of conditions contained in versions of the legislation that was pending before the Maryland General Assembly when it adjourned in April 1999, but MDE has never indicated what, if any, conditions would make it possible for it to issue the permit.

We hope you have not irrevocably rejected negotiations as a means of resolving this matter. Inasmuch as a Maryland Administrative Law Judge, after hearing all of MDE's evidence, concluded that the project would have no adverse environmental impact on the Potomac River and your final Decision-Maker agrees that water quantity is nor an issue, we believe there should be a basis on which the matter could be resolved short of continued litigation.

As you know the parties are scheduled to resume their adversarial relationship before the ALJ on November 11, 1999. We would like to find a way to avoid the expenditure of further public funds for litigation, and we would like to

restore the era of cooperation with regard the Potomac which was a signal accomplishment of the region from 1978 until 1996.

We are communicating directly with you now in the hope that you have either not understood the Authority's flexibility, or that you have reviewed this matter again and may feel that it is now timely to enter into good faith negotiations to resolve this matter.

We would like to reiterate that the Authority is willing to take further steps to accommodate any concerns that you may have. If you could authorize someone to enter into a give-and-take negotiation with the Authority to seek a reasonable solution, we will be ready instantaneously to meet with you or your representative.

If, however, Maryland remains unwilling to negotiate or to discuss the issuance of a permit for an offshore intake under any conditions whatsoever, we would appreciate a letter from you confirming this so we can proceed down the long road of administrative and legal proceedings with the knowledge we have done all that we can to resolve the matter without litigation.

Sincerely yours,

/s/ Fred C. Morin
Fred C. Morin
Chairman

cc: Members, FCWA
Adam D. Snyder, Esquire
Stuart L. Raphael, Esquire

APPENDIX R — LETTER FROM J.L. HEARN TO FRED C. MORIN DATED OCTOBER 29, 1999

[Letterhead of Maryland Department of the Environment]

October 29, 1999

Fred C. Morin
Chairman
Fairfax County Water Authority
8570 Executive Park Avenue
P.O. Box 1500
Merrifield, Virginia 22116-0815

Dear Mr. Morin:

Secretary Jane Nishida has asked me to respond to your recent letter regarding the proposed mid-river intake and negotiations with the Fairfax County Water Authority (FCWA). As a matter of policy and professional courtesy, the State of Maryland is always open to the discussion of any project that affects Maryland's waters and wetlands, especially in matters of interstate significance. Maryland met frequently with the FCWA staff prior to the permit decision and has continued to give full consideration to proposals that have been made through the FCWA attorneys. Unfortunately, the concerns that are the basis for the Maryland's position, which were also raised by the citizens of Maryland and Virginia, have not been addressed.

The information submitted by FCWA in support of its application shows that water quality in the Potomac River has continually improved in recent years and is generally good at the existing intake. FCWA has indicated that

operational difficulties are few and of short duration, and that increases in turbidity are most often related to weather events in the Sugarland Run and Broad Creek watersheds. FCWA has not demonstrated that an off-shore intake will be effective in providing significant improvements in public health and safety.

In our negotiations, the State of Maryland must take into account uses of the Potomac River in addition to water supply. Improving the quality of the source water is the preferred option because it benefits all uses. I am still awaiting a positive proposal from FCWA that addresses the many significant outstanding issues raised by the Department.

Sincerely,

/s/ J. L. Hearn
J.L. Hearn
Director
Water Management Administration

JLH:GTS:twc

cc: Secretary Jane T. Nishida

APPENDIX S — LETTER FROM MARK L. EARLEY TO J. JOSEPH CURRAN, JR. DATED NOVEMBER 30, 1999

[Letterhead of Commonwealth of Virginia —
Office of the Attorney General]

November 30, 1999

The Honorable J. Joséph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

Dear Attorney General Curran:

On behalf of the Commonwealth of Virginia, I am writing to call to your attention the unfortunate failure by the State of Maryland to honor the property rights held by Virginia and her citizens under the Potomac River Compact of 1958, and to call upon Maryland to take steps to ensure that those rights are honored.

For more than 200 years, the river that forms the border between our two States has been the subject of formal agreements under which Virginia and her citizens have enjoyed the right to make and carry out improvements extending into the river from the Virginia shores. Originally set forth in the Compact of 1785, those rights were carried forward in the Potomac River Compact of 1958. These rights are not subject to any prerogative in the State of Maryland to judge the necessity of any such improvements, and are only subject to the requirement that Virginia's improvements not obstruct or injure the navigation of the river, or disturb fisheries.

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Desiring to exercise its rights under the Compact of 1958, the Fairfax County Water Authority ("the Fairfax Authority"), a political subdivision of Virginia, has proposed constructing a pipe from the Virginia shore into mid-river to provide a new water intake point. Nothing in the Compact of 1958 requires the Fairfax Authority to obtain the approval of — or obtain any permit from — any official in the State of Maryland in order to construct any such improvement; however, as a matter of comity and for ease of administration, the Fairfax Authority made application for a permit to the Maryland Department of the Environment. This was four years ago. Still no permit has been issued.

During the intervening years, the Fairfax Authority has agreed with all reasonable suggestions by the State of Maryland about the construction of the pipe, including the suggestion that the structure be kept at last 2 ½ feet below the surface of the river, as measured by its lowest flow of record. Maryland officials have stipulated that such a structure would not obstruct or injure the navigation of the river, nor disturb fisheries. The United States Army Corps of Engineers has also given its approval, subject only to a successful resolution of the permit question. Still the permit has not been issued. Instead, Maryland officials have demanded that Virginia now demonstrate to the satisfaction of your State the necessity of the pipe. This is not acceptable. Nothing in the Compact of 1958 permits the State of Maryland to sit in judgment on the necessity of improvements undertaken by Virginia and its citizens. As I am sure you will understand, the Commonwealth cannot acquiesce in such an infringement on the riparian rights exercised by Virginians

for more than 200 years — just as Maryland could not do so if the facts were reversed.

Solely as a matter of comity between our States — and not to suggest any power of review on the party of Maryland — I must also bring to your attention the reasons why Virginia views this matter with such seriousness. More than one million Virginians depend on the Potomac River for their water. The intake pipe that is now in use is quite close to the shore and the quality of water drawn into it has deteriorated markedly over the years, making it more expensive to treat and less reliable as a source of clean, healthful water. The new mid-river intake would be more reliable, provide a better quality of water and require less expensive treatment procedures. These are substantial advantages, which I trust demonstrate Virginia's resolve and purpose in the matter.

Four years is long enough to wait for your State's assent. The people of Virginia are entitled to the benefits the new pipe will bring them without further delay. Accordingly, the Commonwealth of Virginia hereby calls upon our sister State of Maryland to bring this issue to a successful resolution by the end of the year. This can be done either by causing a fully effective permit to be issued by that date or by making formal acknowledgement that, under the Potomac River Compact of 1958, the Fairfax County Water Authority needs no permit from Maryland before proceeding with the construction of this improvement.

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Your careful attention to these concerns will be most appreciated.

Very truly yours,

/s/ Mark L. Earley
Mark L. Earley

APPENDIX T — LETTER FROM J. JOSEPH CURRAN TO MARK L. EARLEY DATED JANUARY 4, 2000

[Letterhead of State of Maryland —
Office of the Attorney General]

January 4, 2000

The Honorable Mark L. Earley
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Dear Attorney General Earley:

Thank you for your recent letter concerning the Fairfax County Water Authority's proposal to construct a mid-river water intake in the Potomac River. While I appreciate your concerns and am available to discuss the matter further, I cannot comply with your request to issue a permit for the intake or otherwise waive Maryland's jurisdiction over the matter.

The state of Maryland does not share your interpretation of the 1958 Compact. Article Seven of the Compact preserves the traditional riparian rights of the citizens of Virginia to make and carry out wharves and other improvements into the Potomac. Those rights have always been subject to government regulation in both Maryland and Virginia under the police power. There is no jurisdiction in the Compact that our two states intended to create a new breed of riparian rights in the Potomac that would forever be insulated from state regulation.

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Furthermore, the Maryland Court of Appeals — the highest court in this State — has twice ruled that the Compact of 1785 applies only to the tidal stretches of the Potomac downstream of the District of Columbia. These decisions were carried forward in the Compact of 1958, which itself is expressly limited to the tidal portions of the river. In light of these considerations, the State of Maryland cannot agree that the Fairfax County Water Authority is entitled to construct the proposed intake under the Compact.

As you point out in your letter, the Fairfax County Water Authority submitted an application to the Department of the Environment (MDE) for authorization to build the intake, which application was denied in 1997. The Fairfax County Water Authority exercised its right under Maryland law to initiate a contested contested case hearing challenging MDE's denial of the permit. An initial hearing was held in December, 1998. The proposed decision that resulted from that hearing was rejected by the MDE final decision maker in June, 1999, and a second hearing held in November, 1999. The parties are currently preparing post-trial briefs. The contested case process is mandated by Maryland law and must be allowed to run its course.

The State of Maryland takes very seriously its responsibility to manage the Potomac River and its other natural resources in the public interest. Of particular import is the Chesapeake Bay and its tributaries, among which the Potomac is one of the largest. At the same time, Maryland takes very seriously its obligations to Virginia under the 1958

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Compact. While I cannot provide the relief you ask for, I am open to any meeting to discuss our position.

Very truly yours,

/s/ Joe Curran
Attorney General

APPENDIX U — MARYLAND HOUSE BILL 395 (INTRODUCED FEBRUARY 3, 2000)

Maryland General Assembly
HOUSE BILL 395

Unofficial Copy 2000 Regular Session
M3 0lr0921
HB 615/99 – ENV

By: **Delegates Cryor, Barkley, Barve, Bronrott, Boutin, Cadden, Cane, Carlson, Clagett, Conroy, Dembrow, Dypski, Frush, Glassman, Goldwater, Grosfeld, Heller, Howard, Kach, Leopold, Petzold, Rosso, Riley, Sher, Stern, Stocksdale, Walkup, Kopp, Phillips, La Vay, and Shriver**

Introduced and read first time: February 3, 2000
Assigned to: Environmental Matters

A BILL ENTITLED

AN ACT concerning

Potomac River Protection Act

FOR the purpose of prohibiting a person from constructing or blasting in the Potomac River under certain circumstances; prohibiting the Secretary of the Environment from issuing a waterway construction permit to construct a water intake pipe in the Potomac River unless certain circumstances exist; making provisions of this Act severable; providing for the

legislative intent of this Act; defining a certain term; and generally relating to the protection of the Potomac River.

BY adding to

Article — Environment
Section 5-12A-01 through 5-12A-04, inclusive, to be under the new subtitle

"Subtitle 12A. Potomac River Protection Act"

Annotated Code of Maryland
(1996 Replacement Volume and 1999 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article — Environment

SUBTITLE 12A. POTOMAC RIVER PROTECTION ACT.

5-12A-01.

IN THIS SUBTITLE, "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.

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5-12A-02.

THE PURPOSE OF THIS SUBTITLE IS TO:

(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION; AND

(2) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.

5-12A-03.

(A) UNTIL STUDIES CONCERNING THE POTOMAC RIVER AND WATER RESOURCES IN THE WASHINGTON METROPOLITAN AREA ARE COMPLETED AND SUBMITTED TO THE GOVERNOR AND GENERAL ASSEMBLY, A PERSON MAY NOT:

(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;

(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE; OR

(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

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5-12A-04.

THE SECRETARY MAY NOT GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:

(1) THE PIPE WILL BE USED AS AN ALTERNATIVE FOR A PIPE ALREADY IN USE;

(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;

(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE CAPACITY OF THE INTAKE ALREADY IN USE; AND

(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000

APPENDIX V — MARYLAND SENATE BILL 729 (INTRODUCED FEBRUARY 4, 2000)

SENATE BILL 729

Unofficial Copy 2000 Regular Session
M1 0lr2488

By: **Senators Van Hollen, Hogan, Roesser, Frosh, Pinsky, Forehand, and Sfikas**

Introduced and read first time: February 4, 2000
Assigned to: Economic and Environmental Affairs

A BILL ENTITLED

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to submit certain reports to the General Assembly; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; and generally relating to the waters in the Potomac River basin.

Appendix V

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article:

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin;

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment; and

(4) If Chapter __ (H.B. 64) of the Acts of the General Assembly of 2000 takes effect, the report of the Task Force to Study the Minimum Flow Levels in the Potomac River.

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

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(1) The new pipe will replace a pipe already in use;

(2) The new pipe cannot be used concurrently with the pipe to be replaced;

(3) The new pipe cannot withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

(4) The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

Supreme Court, U.S.
FILED
APR 21 2000
CLERK

(3)

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

On Motion For Leave To File Bill Of Complaint

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

J. JOSEPH CURRAN, JR.
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State of Maryland

Counsel of Record

33pp

QUESTIONS PRESENTED

1. Is the exercise of original jurisdiction appropriate when (a) the waterway construction permit request that triggered Virginia's complaint is the subject of an ongoing administrative proceeding in which no final determination has yet been made; (b) the same Compact issues asserted in this case have been raised by a political subdivision of Virginia in that proceeding and must be resolved there if the permit request is to be denied; and (c) Maryland has never denied Virginia a permit to withdraw water from the Maryland portion of the Potomac River ?

2. Has Maryland violated interstate compacts entered into with Virginia by regulating construction activity on, and water withdrawals from, Maryland territory in the Potomac River?

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STATEMENT OF THE CASE

The original 1632 charter from Charles I to Cecilius Calvert, Lord Baltimore, included within the territory of Maryland the entire width of the Potomac River to the high water mark on the Virginia side. (App. 19a.) However, in recognition of Virginia's historical use of the south shore of the river, the Black-Jenkins Award arbitrators subsequently set the final boundary between the two States at the low water mark on the Virginia side of the Potomac River. (App. 29a.) The territory of the State of Maryland, therefore, now extends to the low water mark. (App. 45a.)

A. Maryland Regulation Of Potomac Water Use.

Maryland regulates the appropriation of water from all territorial waters of the State, including the Maryland portion of the Potomac. *See* MD. CODE ANN., ENV'T ART. § 5-502 (1996 Repl. Vol.). Maryland law requires any person seeking to appropriate or use the waters of the State to obtain a permit from the Maryland Department of the Environment (MDE). *Id.*, §§ 5-502, 5-507. The Maryland permitting program is based on the riparian water law principle of "reasonable use." Under the Maryland program, MDE allows all riparian users an appropriation that is reasonable in relation to their projected level of use over a 12-year permit period so long as the use does not harm other riparian users or degrade the waters of the State. Code of Maryland Regulations (COMAR) 26.17.06.05A. Maryland considers a number of factors in determining "reasonableness," including the cumulative impact that all uses may have on the water resource. COMAR 26.17.06.05B(2). The purpose of the program is to conserve the State's water resources while ensuring that all riparian users have sufficient water for their needs. COMAR 26.17.06.02A

Virginia users have for years applied to Maryland for permits to withdraw water from the Maryland portion of the Potomac. For example, a permit was issued in 1964 to the Great Eastern Utilities Corporation, a Virginia entity. Other Virginia users include the Town of Leesburg, Virginia (1968), the Fairfax County Water Authority (the Authority)

(1974), and the Northern Virginia Regional Park Authority (1976). As Virginia acknowledges, Maryland has never denied a Virginia user a permit to appropriate water from the Potomac. Br. at 29.

In addition to regulating water withdrawals, Maryland has worked cooperatively with other regional jurisdictions and water utilities in devising a plan, known as the Low Flow Allocation Agreement (LFAA) (App. 78a), for allocating water use in the Metropolitan Washington area during times of low flow in the Potomac. The LFAA is designed to balance water use and "instream" environmental values by maintaining a minimum base flow in the river during times of drought. The effectiveness of the LFAA, however, is limited by its jurisdictional reach, which extends only to an 18-mile stretch of the Potomac between Little Falls within the District of Columbia and the "Seneca Pool." (App. 82a ¶ A.1.) This is problematic because intense development has occurred, and rapid growth is expected to continue, in the areas along the Potomac upstream of the portion governed by the LFAA. The Maryland permitting program is the only mechanism in place for allocating and monitoring water use from this part of the Potomac – a distance of approximately 250 miles. In these upstream areas, Maryland includes in all permits low flow augmentation provisions that are designed to ensure adequate water supply for all water users on the Potomac. COMAR 26.17.07.02. The LFAA specifically recognizes the Maryland permitting program and declares that nothing in the LFAA restricts or limits Maryland's authority to regulate water use from the Potomac River. (App. 79a, 94a ¶ C.)

B. Maryland Regulation Of Waterway Construction Within The Potomac.

Maryland also regulates the construction of bridges, wharves, pipelines, cables, and other structures in all territorial waters of the State, including the Maryland portion of the Potomac. *See* MD. CODE ANN., ENV'T ART.

§ 5-503, 5-504. Maryland law requires any person seeking to place any structure within the Maryland portion of the Potomac to obtain a waterway construction permit from MDE. *See id.* at §§ 5-504, 5-507. Applications for these permits are evaluated under a public interest standard that requires MDE to "weigh all respective public advantages and disadvantages and make all appropriate investigations," and to base its permit decision on whether the proposed construction is in the "best public interest." *Id.*, § 5-507(a). In determining whether a proposed project is in the best public interest, MDE evaluates a variety of factors, including the project's flood risk and its effect on fish, aquatic habitat, and other instream values. *See* COMAR 26.17.04.11.

As in the water use context, out-of-state users have for years applied for permits to build structures on Maryland territory in the Potomac. In 1967, the Town of Leesburg, Virginia applied for and obtained a permit to construct a drinking water intake in the Potomac. In 1977, the Authority applied for and obtained a permit to construct a drinking water intake structure on the Potomac shoreline. In 1985, the Town of Harper's Ferry, West Virginia, likewise obtained a permit to construct a water intake structure. In none of these cases did the out-of-state user contest Maryland's jurisdiction over the Potomac within its territory.

C. The Present Administrative Litigation.

In 1996, the Authority again applied for a permit from the Water Management Administration (WMA), a division of MDE, this time to build a second water intake structure reaching more than a third of the way across the Potomac into Maryland. The primary purpose of the project, according to the Authority, was to move its intake point far enough out into the Potomac to avoid sediment plumes and other pollutants from Broad Run and Sugarland Run, two Potomac River tributaries located just upstream of the existing intake on the Virginia side of the river. The

Authority's application was based on the premise that, during the localized flood events that generate the sediment plumes from these Virginia tributaries, water quality at the middle of the river would be better than at the Virginia shore.

The Authority's proposal raised complicated issues concerning how water quality and quantity in the Potomac are being affected by rapid development within the river basin. In July 1997, the WMA stated that it was not inclined to issue a permit for a mid-river intake without a more careful consideration of these larger basin-wide issues, and suggested that the Authority consider withdrawing its application pending the completion of the appropriate studies. The Authority declined to withdraw its application. In December 1997, the WMA issued a preliminary denial of the permit on the grounds that there existed alternatives to disturbing the river that would address water quality problems at their source, and that, based on all of the information submitted, the purported benefits of the proposed construction did not justify its environmental impacts.

The Authority exercised its rights under Maryland law to contest the WMA's denial in an administrative contested case hearing. MDE is the final decision maker in matters involving waterway construction permits, *see* MD. CODE ANN., ENV'T ART. §§ 5-503, 5-504, 5-507, and has delegated to an Administrative Law Judge of the Maryland Office of Administrative Hearings the authority to hold trial-type adjudicatory hearings, render findings of fact and conclusions of law, and issue a Proposed Decision recommending how MDE should rule. *See* MD. CODE ANN., STATE GOV'T ART. §§ 10-205, 10-220 (1999 Repl. Vol.). The parties have the right to file "Exceptions" to the Proposed Decision and to request oral argument. *Id.*, § 10-216; COMAR 08.01.04.23. Based on the evidence collected at the hearing, the exceptions, and oral argument, MDE may either adopt, revise, or reverse the Proposed Decision within 30 days of the exceptions hearing. MD.

CODE ANN., STATE GOV'T ART. § 10-221; COMAR 08.01.04.24. MDE's final decision in a contested case constitutes final agency action that is subject to judicial review, and may be reversed if the reviewing court determines that the agency's decision, among other things, is unconstitutional, exceeds the statutory authority or jurisdiction of the final decision maker, results from an unlawful procedure, or is affected by any other error of law. MD. CODE ANN., STATE GOV'T ART. § 10-222(h).

The contested case concerning the Authority's permit application began in September 1998 with a pre-hearing conference at which the Authority raised the same arguments that Virginia raises in its brief concerning the effect of the Compact of 1785. The parties then briefed the Compact issue, with the Authority arguing, as does Virginia here, that it was entitled to a permit pursuant to its Compact rights.

Prior to the administrative hearing, the Administrative Law Judge ruled that, under the Maryland waterway construction statute, MDE could not consider the applicant's "need" or justification for its proposed project in deciding whether to issue a waterway construction permit. (App. 143a.) Accordingly, the WMA was limited at the hearing to putting on evidence describing the environmental impact that construction of the intake would have, and neither party could address the purported benefits of a mid-river intake. (App. 152a-153a.) At the close of WMA's case, the Authority moved for judgment on the strength of the ALJ's pre-trial ruling. (App. 144a.) The ALJ granted the Authority's motion and issued a Proposed Decision recommending that MDE issue a permit for the intake. Because the ALJ ruled in the Authority's favor on the merits, she did not reach the Compact issue. (*Id.*)

The WMA exercised its right to file exceptions to the ALJ's Proposed Decision, arguing that the ALJ's pre-trial ruling conflicted with the statute's mandate that MDE "weigh the respective advantages and disadvantages of the

proposed construction" and base its decision on the outcome. MD. CODE ANN., ENV'T ART. § 5-507(a). Oral argument on the exceptions was held on April 30, 1999 (App. 146a), and the final decision maker issued his Opinion and Order on June 7, 1999, remanding the case to the ALJ to hear evidence on the "need" issues (*i.e.*, the project's benefits or "advantages") that the ALJ had ruled were irrelevant. (App. 166a-169a.)

On remand, the parties agreed upon a November 12, 1999 date for resumption of the hearing, which was held over six days ending on November 23, 1999. The hearing focused on a comparison of water quality at both the middle of the river and at the Virginia shore, and also addressed differences in water quality that may affect the efficiency of the water treatment process and the relative health risks posed by the potential presence of *Cryptosporidium* in different spots within the Potomac – precisely those issues that Virginia cites in support of the gravity of its claim. Br. at 28-29. At the ALJ's request, the parties filed post-hearing Proposed Findings of Fact and Conclusions of Law, including extensive briefing of the Compact issue. The ALJ is required to issue a Proposed Decision by May 30, 2000. COMAR 08.01.04.22C. The parties will then have the opportunity to file exceptions to the proposed decision. A final decision is expected this Fall.

REASONS FOR DENYING THE MOTION

I. THE CONTROVERSY IN THIS CASE IS NOT JUSTICIABLE AND CAN BE RESOLVED IN A PENDING PROCEEDING IN WHICH THE SAME CLAIMS BROUGHT HERE HAVE BEEN RAISED BY A VIRGINIA POLITICAL SUBDIVISION.

Virginia's motion for leave should be denied for the principal reason that this Court's original jurisdiction extends to "Controversies between two or more States," and no controversy exists between Maryland and Virginia other than the one that is the subject of an ongoing administrative proceeding in which the exact claims asserted in this case can be and have been raised on behalf of Virginia by one of its political subdivisions. The resolution of that controversy has not resulted in any actual, concrete injury because no conclusive determination has been made whether to issue a permit allowing the construction of the water intake facility that lies at the heart of that case and this one. The need for such a determination is critical because the issuance of the requested permit would eliminate the dispute giving rise to Virginia's complaint against Maryland. Stripped of that dispute, this case involves only an abstract disagreement between these States as to the proper interpretation of the Compacts they previously executed. Such disagreements do not give rise to a justiciable controversy warranting the exercise of this Court's original jurisdiction.

Recognizing the "delicate and grave" nature of its original jurisdiction, *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), and the concern that the Court not "reduce drastically" its "attention to those controversies for which this Court is a proper and necessary forum," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971), the Court has stated "more than once that our original jurisdiction should be exercised 'sparingly.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v.*

Louisiana, 451 U.S. 725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976)). It is "justified only by the strictest necessity," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 505, and "obligatory only in appropriate cases" that present a claim of sufficient "seriousness and dignity," *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), and lack "an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Virginia's request for leave should be denied because the issues it asks this Court to resolve have been asserted prematurely, and those issues are not only pending in another forum in which appropriate relief may be obtained, but must be addressed there if the permit request triggering this suit is to be denied.

A. Virginia's Complaint Does Not Allege A Justiciable Controversy.

As Virginia makes clear in its brief, this case has been filed because the Fairfax County Water Authority has not prevailed in proceedings it commenced to obtain from the Maryland Department of the Environment a waterway construction permit allowing it to build a new water intake facility in the Potomac River. *See, e.g.*, Br. at 19 ("For more than four years Maryland has refused to grant Virginia a permit to build a new intake in the waters of the Potomac."); *id.* at 10 ("Maryland's treatment of Virginia over the course of the past four years gives rise to the present controversy."). Virginia acknowledges, however, that the Maryland administrator responsible for making a conclusive determination on the Authority's permit request has not yet rendered such a decision. Br. at 16. Without a final decision, Virginia's complaint does not present a justiciable "controversy" within the meaning of Article III, § 2 of the Constitution.

Article III, § 2 does not "confer jurisdiction upon the court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation

of the constitutional grant." *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). "To constitute such a (justiciable) controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). The complaint should be dismissed because Virginia has not suffered any concrete injury and so cannot "demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976).

Despite Virginia's complaints about the ongoing Maryland administrative permit proceeding, that proceeding has not generated any "actual or threatened injury amenable to judicial remedy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). On the contrary, the Authority's permit request is still pending and awaiting from the administrative decision maker "a final and authoritative determination." *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Until such a "conclusive determination" is rendered this Fall, neither the Authority nor Virginia can claim that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).

"Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Such an invasion simply does not exist here. Rather, Virginia asks this Court "to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of

government." *Massachusetts v. Mellon*, 262 U.S. at 484-85. That is not a sufficient basis for the exercise of this Court's original jurisdiction because that jurisdiction can be asserted "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made. . . ." *Id.* Virginia points to no such injury here.

While Virginia complains that thousands of dollars in "unnecessary solids treatment expenses" have been incurred annually during the pendency of the Authority's waterway construction permit request (and, presumably, the 14 years prior to that request), Br. at 10, 28, virtually any permit applicant sustains some kind of opportunity costs while awaiting a final decision, but that is not enough to constitute an actual or concrete injury warranting judicial relief. The theoretical "increased health risks" that Virginia cites (Br. at 29) similarly do not establish a justiciable controversy, particularly in light of Virginia's acknowledgment that "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." Br. at 11. The motion for leave should thus be denied because no justiciable controversy exists between Virginia and Maryland.

B. An Alternative Forum Exists In Which Virginia's Claims Have Been Asserted And Can Be Resolved.

Original jurisdiction should not be exercised for the additional reason that the Maryland proceeding "provides an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. at 797. This Court has stated in similar contexts that it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). The ongoing Maryland proceeding is such a forum and confirms the absence of any need to exercise original jurisdiction in this case.

First, Virginia's asserted reason for filing suit would

disappear if the administrative decision maker or the Maryland courts hold that the Authority is entitled to the permit it has requested. Indeed, the very issues that Virginia posits as the basis for the gravity and seriousness of its claim – water quality at the middle of the river and at the Virginia shore, the comparative efficiency of the treatment process at the two locations, and the relative health risk from *Cryptosporidium* posed by withdrawing water from the two locations – are being litigated in this alternative forum. Br. at 28-29. These are complicated issues, some of which – most notably, those involving *Cryptosporidium* – involve scientific issues of essentially first impression. Resolution of these issues in favor of the Authority in the pending Maryland proceeding means that the Authority and Virginia "will have been vindicated," *Arizona v. New Mexico*, 425 U.S. at 797, and no need would exist to address the "controversy" Virginia cites as the basis for filing its suit against Maryland.

Second, much like Arizona was in *Arizona v. New Mexico*, 425 U.S. at 794, Virginia is directly represented in the pending Maryland proceeding because the Authority, as Virginia acknowledges, is "a political subdivision created under the laws of the Commonwealth of Virginia." Br. at 7. *See also Maryland v. Louisiana*, 451 U.S. at 743 (distinguishing *Arizona v. New Mexico* on the ground that "one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit."); *Wyoming v. Oklahoma*, 502 U.S. at 452 (stating that "no pending action exists to which we could defer adjudication on this issue" and that "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented").

Conversely, the legal support Virginia offers for the exercise of original jurisdiction in this case misses the mark. Although Virginia asserts that "[t]his Court is the only forum situated to pass fairly upon the proper interpretation

of the interstate compacts and arbitration awards between Maryland and Virginia," Br. at 24, the case that Virginia cites in support of its contention that "[t]he Maryland administrative proceeding is not competent to determine Virginia's rights," *id.*, was not even an original action but rather was decided after certiorari was granted to the Supreme Court of Appeals of West Virginia. *See State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Rather than hold that the West Virginia court was "not competent" to address the Compact at issue in that case, this Court simply observed that "it must have *final* power to pass upon the meaning and validity of compacts" and that "[a] State cannot be its own *ultimate* judge in a controversy with a sister State." *Id.* at 28 (emphases added). In making these observations, the Court relied on *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), which also originated in a State court. The mere presence of an interstate Compact thus no more warrants the invocation of original jurisdiction than did the existence of the constitutional claim in *Arizona v. New Mexico* in which this Court refused to intervene in Arizona's dispute with New Mexico, and instead deferred to an ongoing State proceeding in which the same issue had been raised. *See also Louisiana v. Mississippi*, 488 U.S. 990 (1988).

There is similarly no merit in Virginia's contention that it would be "futile to require that Virginia, through the Authority, litigate the scope of Virginia's interstate compact rights in a Maryland tribunal." Br. at 25. The administrative law judge in the ongoing Maryland proceeding did not reach the Compact issue because it was her view that the Authority was entitled to the waterway construction permit as a matter of Maryland law. (App. 144a.) This does not evidence an improper failure to address the Compact issue, as Virginia suggests, but rather is in complete accord with the settled principle that constitutional issues should be avoided when a case can be decided on a non-constitutional ground. *See, e.g., Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316, 337 (1999).

Related principles of federalism and comity reflected in the Court's abstention jurisprudence also counsel against accepting Virginia's invitation for this Court "to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Although the Maryland administrative law judge was reversed by the final decision maker in her interpretation of Maryland law, she initially held and may again reach the conclusion that the Authority is entitled to a waterway construction permit as a matter of State law. The Maryland courts could also render such a determination in the event of an appeal from the grant or denial of the permit. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court" that obviates the need to resolve the federal issue. *Id.*

Similarly, in light of Maryland's comprehensive administrative and judicial review process discussed earlier, in which Virginia's Compact claims can be raised and preserved for this Court's review, exercising original jurisdiction also creates needless friction with Maryland's "unified method for the formation of policy and determination of cases" involving water management and the environment. *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 (1943). This friction is only heightened by the ongoing nature of the Maryland administrative proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971).

Claiming that the outcome of these proceedings has been influenced by "parochial factors," Br. at 27, Virginia complains that "submitting the compact issue to Maryland's legal system has been pre-determined by Maryland" (*id.* at 26) because that issue was decided by the Maryland Court of Appeals in *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926). This assertion is fundamentally flawed for the principal reason that, as stated previously, the waterway construction permit request can be granted on State law grounds without regard to the Compact issue.

Moreover, Virginia assumes too much in suggesting that the current Maryland Court of Appeals would follow a decision issued three-quarters of a century ago if, as Virginia contends, that case was "wrongly decided." Br. at 26 n.10. Refusing to accept the same "assumption that state judges will not be faithful to their constitutional responsibilities," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), this Court rejected the similar contention "that exhaustion of state appellate remedies should not be required because an appeal would have been 'futile.'" *Id.* at 610. *See also Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 500 ("While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered [by Ohio courts] against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true.").

There is likewise no merit in Virginia's complaint that this Court's jurisdiction should be exercised because proposed Maryland legislation "would prevent MDE from issuing the Authority's waterway construction permit." Br. at 17. That proposed legislation has since been amended, and the law enacted by the Maryland legislature preserves MDE's ability to issue a waterway construction permit to the Authority in the administrative proceeding. *See* Maryland Senate Bill 729 (enrolled April 7, 2000). Even if this legislation did have the effect, however, of blocking the Authority's mid-river intake proposal, the Maryland administrative and judicial process is fully able to adjudicate and determine whether the same Compact claim raised here overrides such a law.[1]

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[1] There is similarly no merit in Virginia's contention that the Maryland Governor's views of the permit request constitute evidence of impermissible "partiality" (Br. at 27)

(continued...)

Virginia's claim that "Maryland's water appropriation permitting system violates Virginia's interstate compact rights," Br. at 29, is even less appropriate for the exercise of this Court's original jurisdiction. Virginia concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River." *Id.* This includes the Authority, which obtained its most recent appropriation permit in 1996. Br. at 13. This concession confirms the absence of any justiciable controversy as to the water appropriation issue.

Moreover, despite Virginia's assertion that the pending Maryland administrative proceeding is "not an alternative forum to resolve Virginia's claim" with respect to water appropriation, Br. at 29, that claim would properly be the subject of a future administrative proceeding in the unlikely event that a Virginia entity is ever denied an appropriation permit. As with the pending waterway construction litigation, Virginia's Compact claim would have to be decided in any such future Maryland administrative litigation if a waterway appropriation permit request is to be denied.

Virginia has simply failed to demonstrate any manifest need for this Court to exercise its jurisdiction, as an alternative forum exists in which Virginia's claims can be resolved and in fact are now in the process of being decided. The motion for leave should accordingly be denied.

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[1] (...continued)
that detracts from the adequacy of the ongoing Maryland proceeding. Indeed, Virginia concedes elsewhere in its brief that "the Governor of Maryland has no role under Maryland law in the granting or denying of waterway construction permits . . . ." *Id.* at 15.

II. THE RIPARIAN RIGHT TO BUILD FROM THE VIRGINIA SHORE INTO THE POTOMAC IS A PRIVATE RIGHT THAT IS SUBJECT TO MARYLAND'S POLICE POWER AUTHORITY TO REGULATE THE ENVIRONMENT.

Even if this case presented a justiciable controversy that cannot be remedied in another forum, Virginia's motion for leave should be denied because Maryland has not transgressed Virginia's Compact rights by regulating the Potomac as it has in this case. As this Court has stated, "the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (citing *Alabama v. Texas*, 347 U.S. 272 (1954); *California v. Washington*, 358 U.S. 64 (1958); *Virginia v. West Virginia*, 234 U.S. 117 (1914)). Referring this case to a special master is unwarranted and would "needlessly add to the expense that the litigation must bear," *Ohio v. Kentucky*, 410 U.S. at 644, because Virginia has no cause of action as a matter of law.

A. Maryland Has Not Surrendered Its Police Power Authority To Regulate The Submerged Lands Beneath The Potomac.

Virginia places heavy reliance on the Compact of 1785 in arguing that Maryland does not have the authority to regulate the placement by Virginia citizens of wharves and improvements beyond the low water mark in the Maryland portion of the Potomac River. Br. at 22, 30. Nothing in the Compact, however, strips Maryland of its inherent ability to exercise regulatory jurisdiction over construction within its territory.

Article VII of the Compact, upon which Virginia's claims rest, provides:

> The citizens of each state respectively shall have full property in the shores of [the] Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. . . .

(App. 3a.) The "privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river" is a private property right, traditionally referred to as a "riparian right." *See, e.g., Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1870) (riparian ownership includes "the right to make a landing, wharf or pier . . . subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public"); *Dutton v. Strong*, 66 U.S. (1 Black) 23, 31-32 (1861) (riparian right to construct wharves and piers limited so as not to obstruct "the paramount right of navigation"); *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 434 (1876) ("These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads . . . subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured."); *Baltimore & Ohio R. Co. v. Chase*, 43 Md. 23, 35-36 (1875). *See generally Shively v. Bowlby*, 152 U.S. 1, 18-25 (1894) (summarizing the riparian rights available to citizens of the original thirteen colonies).

Courts in Virginia, Maryland, and elsewhere have universally recognized that, like all private property rights, "riparian rights" such as the property rights reserved in the Compact are subject to regulation under the government's police power. *See, e.g., Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875, 880 (1904) ("we think it well established that the right to build wharves is one which is subject to state regulation"); *Harbor Island Marina, Inc. v. Board of County Com'rs of Calvert County*, 286 Md. 303, 318-19,

407 A.2d 738, 746-47 (1979) (as property, the riparian right to wharf out is subject to public regulation). It is well-settled that the States' police power includes the right to regulate for environmental protection. *See, e.g., Bureau of Mines of Maryland v. George's Creek Coal & Land Co.*, 272 Md. 143, 175, 321 A.2d 748, 765 (1974) (mining regulation constitutes a "reasonable regulation under the State's police power calculated to protect the environment and to preserve State-owned land for public use for present and future generations of citizens"); *Kepo'o v. Watson*, 87 Hawaii 91, 99, 952 P.2d 379, 387 (1998) (environmental regulation is an exercise of the State's police power); *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wash.2d. 464, 479 n.18, 918 P.2d 923, 930 n.18 (1996) (same); *Hayes v. Howell*, 251 Ga. 580, 585, 308 S.E.2d 170, 176 (1983) (same).

Article VII of the Compact contains no language waiving the power of either Maryland or Virginia to regulate those reserved rights, which have always been subject to governmental regulation on both sides of the Potomac. On the contrary, the Compact does not give rise to even a suggestion that either State intended to give up such a power. Nor could it, as implying an intent to relinquish such an attribute of sovereignty would directly contravene two fundamental principles, each of which confirms that Maryland retained its sovereign right to regulate the exercise of riparian rights within its territory.

First, under the "reserved powers" doctrine, a State may not contract away certain sovereign powers, including its police power. *See, e.g., Stone v. Mississippi*, 101 U.S. 814 (1879); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). *See also United States v. Winstar Corp.*, 518 U.S. 839, 874 & n.20, 888-89 & nn.33 and 34 (1996). In these cases, "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Atlantic Coast Line R.*

Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (quoted in *United States v. Winstar*, 518 U.S. at 888). Regulation of riparian rights is no exception to the rule that a State cannot surrender its police power, as "all contract and property rights are held subject to its fair exercise." *Id.*

Second, even when a sovereign power can be relinquished by contract, such a contract is subject to the well-established canon of construction that no sovereign power will be considered surrendered absent clear and unambiguous language set forth in "unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). *See generally United States v. Winstar*, 518 U.S. at 871-79. Thus, in these cases, "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861); *see also Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830).[2]

The principles set forth in these cases confirm that Maryland has not waived its right to regulate the exercise of

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[2] While these principles have been developed under the Contract Clause, they have been applied to treaties between sovereigns. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (holding that the United States had not waived its sovereign interest in its navigational servitude in submerged lands when it entered into a treaty with the Choctaw Indian tribe of the sovereign Cherokee Nation conveying title to those lands). Therefore, "whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837).

riparian rights within its portion of the Potomac, whether by Virginians or Marylanders. Virginia retains the same right with respect to construction within the Virginia portion of the river. *See* Compact of 1958, Preamble (App. 60a) (declaring that "Maryland is the owner of the Potomac River bed and waters to the low water mark of the southern shore thereof" and that "Virginia is the owner of the Potomac River bed and waters southerly from said low water mark"). The Compact did not surrender or restrict Maryland's police powers within its own territory because those powers cannot be surrendered, and the Compact in any event contains no language – much less the requisite "unmistakable terms" – demonstrating that Maryland intended such a surrender. *See also United States v. Winstar*, 518 U.S. at 877-78 (describing *Jicarilla Apache Tribe*, 455 U.S. 130, and *Cherokee Nation of Oklahoma*, 480 U.S. 700, as refusing to infer from silence a waiver of sovereign power).

Consistent with these principles, courts have repeatedly upheld Maryland's jurisdiction over piers, structures, and other riparian interests extending from Virginia into Maryland territory. *See, e.g., O'Neal v. Virginia & M. Bridge Co.*, 18 Md. 1 (1861) (upholding over arguments of Virginia Attorney General Maryland's right to tax portions of cross-Potomac bridge within Maryland); *Miedzinski v. Landman*, 218 Md. 3, 145 A.2d 220 (1958) (upholding Maryland statute passed at request of Governor of Virginia barring the operation of gaming devices on piers built out into the Potomac from the Virginia shore); *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d 534 (4th Cir.1958) (upholding application of Maryland law to Virginians' riparian right to sand and gravel in the Potomac River).

Similarly, Virginians have for years recognized Maryland's jurisdiction over structures in the Maryland portion of the Potomac by applying to MDE and its predecessors for permits. For example, both the Town of Leesburg, Virginia in 1967, and the Authority in 1977 and again in 1996, applied to Maryland for permits to undertake

waterway construction in the Potomac. These actions further illustrate that Maryland did not relinquish its police power authority over the exercise of riparian rights when it entered into the Compact with Virginia in 1785, as "[i]t is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning." *New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting). *See also Air France v. Saks*, 470 U.S. 392, 396 (1985), quoting *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933).

Interpreting the Compact as effecting a surrender of Maryland's jurisdiction over the exercise of riparian rights within the navigable portions of the Potomac would also conflict with the responsibilities of both Maryland and Virginia under the public trust doctrine. This doctrine provides that the States have the responsibility to preserve the navigable waters and the lands submerged beneath them for public use. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842); *Shively v. Bowlby*, 152 U.S. at 14-16; *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988). Recognizing that the public trust doctrine is an aspect of State sovereignty, this Court has observed that "the State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of peace." *Illinois Central*, 146 U.S. at 453.

This abdication is precisely what Virginia claims was the intent of both States when they entered into the Compact. Under Virginia's interpretation of the Compact, neither Maryland nor Virginia would be able to act under the public trust to regulate the exercise of riparian rights between the low water mark and the navigable channel of the Potomac River. Virginia would be powerless to act beyond the low water mark because that is the limit of its

jurisdiction. Maryland would similarly be precluded by the Compact from regulating in the same area for any purpose other than navigation. Such a construction of the Compact should be rejected because it directly contravenes public trust responsibilities that this Court has long held the States may not relinquish.

B. The Authority Has No Compact Right To Build The Proposed Intake Because The Compact Does Not Apply To The Non-Tidal Portion Of The Potomac.

Virginia's claim that the Compact surrendered Maryland's power to regulate the Authority's proposed intake fails for the additional and independent reason that the 1785 Compact was never meant to apply to the non-tidal stretches of the Potomac upstream of the District of Columbia – where the proposed intake would be located. In two decisions, the first of which dates back more than 170 years, Maryland courts have held that the Compact was entered into to resolve the two States' competing claims to the navigable tidewater and its rich fisheries, and did not apply to the non-navigable, non-tidal portion of the Potomac. *See Binney's Case*, 2 Bland 99 (Md. Ch. 1829); *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926). Rather than challenge either of these decisions, Virginia entered into another Compact with Maryland in 1958 that replaced the 1785 Compact, limited itself to the tidewater portions of the Potomac (App. 60a, 66a), and carried forward prior cases construing Article VII of the 1785 Compact. (App. 75a.) This history has two consequences.

First, "[t]he rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926). Since 1829, Maryland courts have construed the 1785 Compact to be inapplicable to the non-navigable portion of the Potomac and have upheld

Maryland's right to pass laws regulating that part of the river. While Virginia argues that the first of the Maryland courts' interpretations "was rejected by the Black-Jenkins arbitrators in 1877" and that the second one "was wrongly decided," Br. at 26 n.10, Virginia never initiated any proceedings in this Court challenging those interpretations, as it acknowledges it did in 1957 when it sought "to enjoin Maryland from abrogating the Compact of 1785 by unilaterally regulating fishing activities in the *tidal* portion of the Potomac River." *Id.* at 6 (emphasis added) (citing *Virginia v. Maryland*, 355 U.S. 269 (1957)). It is too late now to challenge Maryland's right to regulate the non-tidal portion of the Potomac. *See Ohio v. Kentucky*, 410 U.S. 641, 650 (1973) (rejecting motion for leave to add claim when "Ohio for over 150 years has failed to assert, through proceedings available in this Court, the claim it now would raise in the face of Kentucky's legislative and judicial assertions of sovereignty over the river.") (footnotes omitted).[3]

Second, the Compact does not address the non-tidal stretches of the Potomac because Maryland did not have the power to grant riparian privileges to the submerged lands of the non-navigable Potomac. Upon statehood, Maryland and the other original colonies succeeded to the King of England's title to the land beneath the navigable waters. *Shively v. Bowlby*, 152 U.S. at 11-15. Under the English

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[3] *See also California v. Nevada*, 447 U.S. 125, 132 (1980) ("If Nevada felt that those [boundary] lines were inaccurate and operated to deprive it of territory lawfully within it[s] jurisdiction the time to object was when the surveys were conducted, not a century later."); *Michigan v. Wisconsin*, 270 U.S. at 307 (observing that "for a period of more than 60 years [Michigan] stood by without objection, with full knowledge of the possession, acts of dominion, and claim and exercise of jurisdiction on the part of the state of Wisconsin over the area in question.").

common law definition of navigability, "navigable waters" were limited to waters that were subject to the ebb and flow of the tide – tidewaters. *See The Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-57 (1851). *See also Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 336 (1876) ("[I]n England, no waters are deemed navigable except those in which the tide ebbs and flows."). American courts applied the English common law "ebb and flow of the tide" test to determine navigability until 1851. *Compare The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) *with The Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) at 453-57; *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *Barney v. Keokuk*, 94 U.S. (4 Otto) at 337-38. Accordingly, at the time the two States entered into the Compact, Maryland held title only to the submerged lands beneath the tidal waters. *Browne v. Kennedy*, 5 Harris & J. 195 (Md. 1821).

Maryland did not have the power, therefore, to grant Virginians riparian privileges to the submerged lands in the non-tidal Potomac because those lands were privately held as of 1785. *Cf. United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833) (in entering into treaties, "[t]he king cedes that only which belonged to him"). In the tidal Potomac, by contrast, Maryland could convey Virginians a right-of-way beyond the low water mark because Maryland owned the submerged lands. The Compact thus applies only to the tidal portions of the Potomac. *See Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 438 (1838) ("No construction of a treaty which would impair that security to private property which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require.").

The rights reserved by Article VII of the 1785 Compact ensured that Virginia's citizens would not be cut off from the navigable portion of the Potomac and would continue to be able to exercise their riparian rights to wharf out. Without entering into such an agreement, Maryland could have reserved the submerged lands beyond the low water

mark for the exclusive use of Marylanders. *See, e.g., McCready v. Virginia*, 94 U.S. (4 Otto) 391 (1876) (upholding conviction of a Maryland citizen under Virginia statute making it illegal for any non-Virginian to plant oysters in the submerged lands of Virginia's navigable waters); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 879 (observing *McCready* established that "the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state"). Thus, the Compact gave Virginians the valuable right to wharf out beyond the low water mark to the navigable channel in the Maryland portion of the Potomac. Such a riparian right, however, had always been subject to government regulation under the police power and the States' paramount interest in lands covered by the navigable waters.

C. Maryland Has The Authority To Regulate Water Withdrawals From Its Territory.

Virginia's claim that Maryland may not regulate the withdrawal of water from its own territory is similarly without merit. For support of this remarkable proposition, Virginia relies entirely on the "equitable apportionment" doctrine frequently applied to resolve two States' competing interests in interstate waters. Br. at 23. But none of the Court's equitable apportionment cases have involved a situation where, as here, one State seeks to withdraw water from another State's territory. As the Court declared in a seminal equitable apportionment decision, "[i]t is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Kansas v. Colorado*, 206 U.S. 46, 93 (1907). *See also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) ("as to every stream within its dominion a state may . . . permit the appropriation of the flowing waters for such purposes as it deems wise"); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (recognizing State's

police power to regulate water withdrawals within its boundaries, while striking down Nebraska's reciprocity requirement as discriminating against interstate commerce in appropriated groundwaters). There is simply no authority to support the proposition that a State may not regulate the reasonable use of waters within its boundaries.

In sum, even if this case presented a justiciable issue for which there is no adequate alternative forum, Virginia's motion for leave should be denied because Maryland has not violated any rights in regulating the Potomac as it has for the past two centuries. This case presents no question warranting the exercise of this Court's jurisdiction.

CONCLUSION

For the reasons stated, the motion for leave should be denied.

Respectfully submitted,

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No. 129, Original

Supreme Court, U.S.
FILED
MAY 2 - 2000
CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

REPLY BRIEF

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INTRODUCTION

After Virginia filed suit here, Maryland passed legislation to ban new water intakes in the Potomac River for at least the next three years and to limit the capacity of any "replacement" intakes. The purpose is to freeze Virginia's use of the River and to control Northern Virginia's economic growth. To consummate that plan, Maryland has adopted a strategy of delay in this Court to complement its administrative delay that, since 1996, has prevented construction of an offshore intake that Virginia believes is an "essential public health initiative" (App. 131a).

Maryland's highest court has ruled that the 1785 Compact does not apply above tidal waters. Moreover, Maryland now argues that Virginia has waived its Compact rights because various Virginia citizens and localities have applied to Maryland for permits. Obviously, any attempt by Virginia to raise its Compact claims in Maryland is doomed from the outset. If Virginia's Compact issues are to be resolved fairly, they must be heard here.

Maryland, however, states that this Court should decline original jurisdiction on the bare possibility that Maryland might render the Compact issues irrelevant by some day granting the permit. But that application has been pending since 1996, and the new legislation guarantees that it will remain so for many more years, and perhaps forever. Maryland places Virginia in a "Catch-22." It demands that Virginia submit to Maryland's authority over access to the Potomac River but refuses to provide an adequate forum to resolve the Compact issues. The only feasible and fair solution is original jurisdiction in this Court and resolution of Virginia's claims in a neutral forum.

RECENT MARYLAND LEGISLATION TARGETING VIRGINIA'S POTOMAC RIVER ACCESS

In its session ending April 10, 2000, Maryland's legislature unanimously passed two versions of the so-called "Potomac River Protection Act," H.B. 395 (Supp. App. W) and S.B. 729 (Supp. App. X). Both bills assert Maryland's exclusive control over the River. Maryland Governor Parris Glendening's

spokesman has announced that the Governor intends to sign one of the versions into law.[1] Both bills forbid the Maryland Department of Environment ("MDE") from issuing any waterway construction permit for any new water intake structures until six months after MDE submits the results of three studies to the Maryland legislature. (Supp. App. W, X, § I(b)). H.B. 395 has no deadline by which MDE must submit those results, thus creating the potential for indefinite delay. S.B. 729 provides for the studies to be submitted by July 1, 2002. (Supp. App. X, § I(a)). Combined with the 6-month permit moratorium following that submission, S.B. 729 creates a three-year delay.

In the interim, both bills prohibit *any* new Virginia intakes in the River, thus preventing Loudoun County and the Loudoun County Sanitation Authority from constructing a new water intake that they are considering. (*Brief Amicus Curiae of Loudoun County et al.* at 7). While both bills purport to allow MDE to approve "replacement" intakes, they limit the physical capacity of the replacement intake and vest in Maryland exclusive control over future intake capacity. (Supp. App. W, X; Supp. App. Z, Crowder Decl. ¶ 6). Both bills seek to freeze economic development in Northern Virginia, a purpose specifically trumpeted by their sponsors. (*See* Supp. App. Y, Kronenthal Decl. ¶ 3; *Maryland to Restrict Fairfax Use of Potomac*, *supra*).

For instance, Senator Van Hollen, the chief sponsor of S.B. 729, testified that his bill was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. (Supp. App. Y, ¶ 3). He said that a limitation on the intake's capacity was needed to ensure that Virginia will not be "fueling more development on the Virginia side of the river, which has been out of control." (*Id.*). Van Hollen also urged that since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the

1. Matthew Mosk, *Maryland to Restrict Fairfax Use of Potomac*, The Washington Post, Mar. 28, 2000, at B1.

right to withdraw water from the Potomac River without Maryland's consent, the limitation on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval. (*Id.*). To minimize the legislation's impact on Maryland, the bills were specifically amended in order to *exempt* three *Maryland* entities from the prohibition on constructing new water intakes. (*Id.*, ¶ 6).

I. THE CONTROVERSY IS SERIOUS, JUSTICIABLE AND RIPE.

This controversy is serious, justiciable and ripe. Accelerating acrimony between the States prompted Maryland State Senator Clarence W. Blount to state starkly that if "Virginia and Maryland were independent states, we would be at war over this." (Supp. App. Y, ¶ 4). Virginia officials have likewise returned Maryland's fire. *See Maryland to Restrict Fairfax Use of Potomac*, *supra* (B. Rubin stating that "[i]f they want to pass laws, we can, too.").

This Court's exclusive original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Virginia seeks to do that here by vindicating its rights under Clause IV of the Black-Jenkins Award (App. 48a-49a), Article VII of the 1785 Compact (App. 3a, 75a), and Article VII, § 1, of the 1958 Compact (App. 75a), to use the waters of the Potomac River and to build improvements appurtenant to the Virginia shoreline.

Maryland is violating those compacts by asserting exclusive control over Virginia's access to the River. Virginia is suffering injury from Maryland's actions, including the denial of Potomac River access, continued exposure of its citizens to unnecessary public health risks,[2] risk of an interrupted water supply,

2. Virginia considers the offshore intake to be an "essential public health initiative." (App. 131a). Many years' operating data and mid-river sampling confirm that water in the River's channel contains fewer

(Cont'd)

substantial unnecessary water treatment costs that can never be recovered, and interference with the plans of several governmental subdivisions to use the River as a drinking water source. (Bill Comp. ¶¶ 19-25, 43; Loudoun Br. at 3-5).

In *Colorado v. New Mexico*, 459 U.S. 176 (1982), a case ignored by Maryland, the Court found that Colorado had standing to assert its interests in the Vermejo River against competing claims on the River by New Mexico. *Id.* at 182 n.9. A single, private company in Colorado planned to use the River for "industrial development and other purposes." *Id.* at 178. The Court rejected New Mexico's argument that Colorado was "improperly suing directly and solely for the benefit of a private individual," stating that "other Colorado citizens may *jointly use the water or purchase water rights in the future*," and emphasizing that "Colorado surely has a sovereign interest in the beneficial effects of a diversion *on the general prosperity of the State*." *Id.* at n.9 (emphasis added). *See also Kansas v. Colorado*, 206 U.S. 46, 99 (1907) (under similar circumstances concluding that "[t]he controversy rises above a mere question of local private right and involves a matter of state interest and must be considered from that standpoint").[3]

(Cont'd)
contaminants and pathogens than water on either shore, and is necessary to produce the purest and safest drinking water. (*Id.*; Bill Comp. ¶ 21-25). The fact that drinking water currently produced by FCWA meets minimum federal standards does not obviate the health risks posed by drawing turbid water with greater concentrations of pathogens from the shore. Waterborne disease outbreaks resulting in many deaths and illnesses have occurred recently in communities that likewise met minimum state and federal water quality standards. (*Id.* ¶ 22-25).

3. For other justiciability cases recognizing the State's interest in protecting its citizens' water rights, health or comfort, *see Maryland v. Louisiana*, 451 U.S. 725, 737-38 (1981); *United States v. Nevada*, 412 U.S. 534, 539 (1973); *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Virginia also has standing as a direct consumer of Potomac River water by more than 100 State government offices. (Bill Comp. ¶ 3).

Virginia's interest is even more compelling. The bulk of Northern Virginia's population depends on the Potomac River to supply drinking water and fire protection needs; their interests are presently and gravely threatened by Maryland's efforts to impede Virginia's access to the River.

II. NO ALTERNATIVE FORUM IS FAIR OR ADEQUATE.

The premise of this Court's alternative forum analysis is that if a State can receive fair consideration of its claims in another "appropriate" forum, judicial resources may be saved by declining an original action lawsuit. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Whether another forum is "appropriate" must be decided "on a case-by-case basis." *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). Stated bluntly, Virginia has not gotten and will not get fair consideration of its compact rights in Maryland. Original jurisdiction is warranted because "parochial factors" in Maryland have led at least "to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

Every branch of Maryland government has already decided Virginia's compact rights against Virginia and in favor of Maryland. After watching the permit application of the Fairfax County Water Authority ("FCWA") proceed for four years, the Maryland General Assembly stepped in to freeze Virginia's use of the Potomac while the sponsors boasted openly that their legislation will control Northern Virginia's economic development. (Supp. App. Y, ¶ 3; Bill Comp. ¶¶ 32, 41). Maryland's Governor personally intervened in the administrative proceeding to deny FCWA's waterway construction permit. (App. 134a). J.L Hearn, the senior MDE official who originally withheld FCWA's permit, recently told FCWA that MDE will still not issue the waterway construction permit, even with the limitations set forth in the new legislation, because of the positions already taken by his superiors (the Governor and the Secretary of MDE). (Supp. App. Z, Crowder Decl. ¶¶ 2-3). The Maryland Attorney General maintains that Virginia has no

compact rights upstream of the tidal reach of the Potomac and that, even if it did, they would be subject to Maryland regulation. (App. 180a-181a). And Maryland's highest court has ruled that the 1785 Compact does not apply above tidal waters. *Middlekauff v. LeCompte*, 132 A. 48, 50 (Md. 1926).

Barring a surprise reversal some day by the Maryland Court of Appeals of its own decision in *Middlekauf*, Maryland is not going to acknowledge Virginia's compact rights. Yet, only this Court has the power to interpret the compacts in question in a manner binding on both States. *Mississippi v. Louisiana*, 506 U.S. at 77-78; *Texas v. New Mexico*, 462 U.S. at 568; *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 29 (1951). Without an original action, the only prospect for resolving the compact dispute would be by petition to this Court for writ of certiorari, *perhaps a decade or more from now*, to the Maryland Court of Appeals.

Thus, the judicial economy ordinarily expected when this Court declines original jurisdiction in favor of another forum simply cannot be obtained. Relegating Virginia to Maryland's tribunals under the facts of this case will lead only to needless expense, delay and continued injury to Virginia. It will also run counter to the principle that "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Dyer*, 341 U.S. at 28. That principle is especially true here, where the State has *already* decided the matter in its own favor.

This Court should likewise reject Maryland's argument (Opp. 12-13) that the compact issues presented here might be avoided if MDE should have a change of heart about the FCWA's permit, or if the Maryland courts on appeal should determine that the FCWA is entitled to a waterway construction permit under Maryland state law.[4] Even accepting that unlikely premise, it would not provide the relief to which Virginia is entitled and

4. The Army Corps of Engineers has required FCWA to resolve the dispute over the Maryland construction permit as a condition of obtaining reinstatement of the previously issued federal permits. (App 177a). Maryland's refusal has killed the project.

seeks in this Court: a determination that the compacts prevent Maryland from requiring that Virginia and its subdivisions obtain Maryland's permission to access the Potomac River. In short, neither Virginia nor any of its subdivisions should have to submit to Maryland's authority in the first place.

This case is more like *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court rejected the alternative forum as inadequate, and less like *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), where the Court found the alternative forum appropriate. One reason the state court was inadequate in *Maryland v. Louisiana*, but not in *Arizona v. New Mexico*, was that the plaintiff States in *Maryland v. Louisiana* were suffering continuing injury by a delay in a final resolution of their claims (just like Virginia here). 451 U.S. at 743. Significantly, in neither of those cases had the state courts *already* decided the issue in dispute, as the Maryland Court of Appeals has done here. In neither case was the state governmental process parochial and biased, as Maryland's clearly is. This case thus presents a far stronger basis for rejecting the alternative forum than *Maryland v. Louisiana*.

III. MARYLAND BETRAYS ITS DISREGARD FOR VIRGINIA'S RIGHTS.

Part II of Maryland's opposition argues that Virginia does not have compact rights upstream of the tidal reach and that, if it does, those rights are subject to Maryland's regulation. Maryland's argument betrays its contempt for Virginia's rights.

Once an interstate compact is consented to by Congress, it is transformed "into a law of the United States." *Texas v. New Mexico*, 462 U.S. at 564. "One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.*[5] In this case, the express terms of all three Maryland-Virginia compacts clearly

5. The unmistakability and reserved powers doctrines (Opp. 19-20), which deal with contracts rather than *federal* laws, are thus inapposite.

give Virginia and its citizens "the privilege of making and carrying out wharfs and other improvements," Compact of 1785, Art. VII (App. 3a); Compact of 1958, Art. VII, § 1 (App. 75a); and the "right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership. . . ." Black-Jenkins Award, Cl. 4 (App. 48a-49a).

Nothing in the compacts gives Maryland the right to determine whether Virginia "needs" to withdraw water from the River or to build improvements on the Virginia shore. Virginia is entitled to make that judgment for herself and to regulate her own citizens' use of the River accordingly.[6] Maryland's usurpation of that authority stands as a direct obstacle both to the express language of the three compacts, as well as to their obvious purpose, which was to protect Virginia's access to, and use of, the Potomac River.

Maryland's claim that the compacts do not apply upstream of the tidal reach likewise ignores the plain language of Article

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6. *Sporhase v. Nebraska*, 458 U.S. 941 (1982), which recognized Nebraska's limited right to regulate groundwater withdrawals from its own territory, is distinguishable for two reasons. First, unlike this case, no interstate compact was involved. Second, Nebraska's authority was tied to protecting groundwater "in times of severe shortage." *Id.* at 956. That interest does not apply here because the LFAA already grants Virginia, Maryland and the District of Columbia an equitable allocation during water shortages. (LFAA Art. II(C), App. 88a). When water in the River is not scarce and the LFAA is not in effect, Virginia has the same right as Maryland to withdraw water from the River, notwithstanding that Maryland owns the riverbed. *E.g.*, *Colorado v. New Mexico*, 459 U.S. at 181 n.8 (mere ownership of the riverbed did not give the upstream State the right to divert water to the detriment of the downstream State); *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (same). Maryland's new legislation, and its permitting system as applied to Virginia, attempt to circumvent this Court's requirement that a State seeking to prevent another State from diverting water from an interstate stream prove first by clear and convincing evidence that the diversion will cause it injury or damage. *Colorado v. New Mexico*, 459 U.S. at 187 & n.13. Maryland cannot make that showing here.

VII of the 1785 Compact, which imposes no such limitation, as well as Clause IV of the Black-Jenkins Award, ratified by Congress, which provides that Virginia retains the right to use the River along the entire boundary between the States. (App. 48a-49a). The Black-Jenkins arbitrators in their accompanying opinion rejected the same argument Maryland advances here. They concluded that the 1785 Compact applies "to the whole course of the river above the Great Falls as well as below." (App. 29a). This Court expressly agreed with the arbitrators' opinion in *Maryland v. West Virginia*, 217 U.S. 577, 580 (1910), a case Maryland fails to cite. That case held that West Virginia and its citizens succeeded to Virginia's rights to use the Potomac River and to build improvements on the West Virginia shore pursuant to Article VII of the Compact of 1785. *Id.* at 580-81, 585. That holding would have been impossible if this Court had believed that Article VII was inapplicable in the non-tidal waters of the Potomac in West Virginia.

Finally, Maryland unreasonably argues that Virginia has waived its compact rights because several Virginia localities and citizens applied to Maryland for permits beginning sometime in the 1960s. Permit submissions made "as a matter of comity and ease of administration" (App. 177a) do not establish that Virginia as a state has conceded Maryland's right to control Virginia's access to the River. Moreover, the period of time necessary for one state to acquire jurisdiction as against another by prescription must be "substantial," *New Jersey v. New York*, 523 U.S. 767, 786 (1998) (stating that a minimum of 60 years might be sufficient), and the latter state during that time must have "acquiesced in the impositions upon it." *Id.* The period of time here is neither "substantial" nor has Virginia acquiesced in ceding any sovereignty to Maryland. *Id.* at 786. It was not until December 1997 that Maryland first denied any permit to any Virginia user (Bill Comp. ¶ 14).[7] Virginia could

7. Maryland's argument that Virginia should have filed suit after the 1926 Maryland Court of Appeals decision in *Middlekauff v. LeCompte* is similarly perplexing. While that case did rule that the 1785 (Cont'd)

rightly believe (even assuming that it knew about permit applications filed by its citizens or localities), that its rights to use the River and to build "wharves and other improvements" (App. 75a) had simply "not been in controversy," just as the Commissioners who drafted the 1958 Compact had stated (App. 58a).

CONCLUSION

Maryland will continue to deny Virginia her compact rights in the Potomac River unless and until this Court intervenes. This case is extremely important to the health and comfort of the people of Virginia. The motion for leave to file the bill of complaint should be granted.

Respectfully submitted,

MARK L. EARLEY
Attorney General
WILLIAM H. HURD
Solicitor General
ROGER L. CHAFFE
Senior Assistant Attorney General
FREDERICK S. FISHER*
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Attorneys for Plaintiff

* *Counsel of Record*

May 2, 2000

(Cont'd)
Compact did not apply above tidal waters, the case involved only *West Virginia* citizens who were prevented by Maryland from fishing in the upper Potomac. 132 A. at 48.

APPENDIX

APPENDIX W — MARYLAND HOUSE BILL 395 (PASSED UNANIMOUSLY 4/3/2000)

HOUSE BILL 395

Unofficial Copy 2000 Regular Session
M3 0lr0921
HB 615/99 - ENV

By: **Delegates Cryor, Barkley, Barve, Bronrott, Boutin, Cadden, Cane, Carlson, Clagett, Conroy,Dembrow, Dypski, Frush, Glassman, Goldwater, Grosfeld, Heller, Howard, Kach, Leopold, Petzold, Rosso, Riley, Sher, Stern, Stocksdale, Walkup, Kopp, Phillips, La Vay, ~~and Shriver~~ Shriver, and Hubbard**

Introduced and read first time: February 3, 2000
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 25, 2000

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of ~~prohibiting a person from constructing or blasting in the Potomac~~

Appendix W

~~River under certain circumstances; prohibiting the Secretary of the~~
~~Environment from issuing a waterway construction permit to construct a water~~
~~intake pipe in the Potomac River unless certain circumstances exist;~~ requiring the Secretary of the Environment to submit certain reports to the General Assembly; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing a certain exception to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; ~~providing for the legislative intent of this Act; defining a certain term;~~ and generally relating to the ~~protection of~~ waters in the Potomac River basin.

~~BY adding to~~
~~Article - Environment~~
~~Section 5-12A-01 through 5-12A-04, inclusive, to be under the new subtitle~~
~~"Subtitle 12A. Potomac River Protection Act"~~
~~Annotated Code of Maryland~~
~~(1996 Replacement Volume and 1999 Supplement)~~

Appendix W

HOUSE BILL 395

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That ~~the Laws of Maryland read as follows~~:

~~**Article – Environment**~~

~~SUBTITLE 12A. POTOMAC RIVER PROTECTION ACT.~~

~~5-12A-01.~~

~~IN THIS SUBTITLE, "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.~~

~~5-12A-02.~~

~~THE PURPOSE OF THIS SUBTITLE IS TO:~~

~~(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION; AND~~

~~(2) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.~~

~~5-12A-03.~~

~~(A) UNTIL STUDIES CONCERNING THE POTOMAC RIVER AND WATER RESOURCES IN THE WASHINGTON METROPOLITAN AREA ARE COMPLETED AND SUBMITTED TO THE GOVERNOR AND GENERAL ASSEMBLY, A PERSON MAY NOT:~~

~~(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;~~

~~(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE;~~
~~OR~~

~~(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

~~5-12A-04.~~

~~THE SECRETARY MAY NOT GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:~~

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~~(1) THE PIPE WILL BE USED AS AN ALTERNATIVE FOR A PIPE ALREADY IN USE;~~

~~(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;~~

Appendix W

HOUSE BILL 395

~~(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE CAPACITY OF THE INTAKE ALREADY IN USE; AND~~

~~(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article:

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; and

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment.

Appendix W

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The new pipe will replace a pipe already in use;

(2) The new pipe cannot be used concurrently with the pipe to be replaced;

(3) The new pipe does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

(4) The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow.

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

Appendix W

(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION ~~2.~~ 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any

Appendix W

HOUSE BILL 395

reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION ~~3.~~ 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

APPENDIX X — MARYLAND SENATE BILL 729 (PASSED UNANIMOUSLY 4/7/2000)

SENATE BILL 729

Unofficial Copy
M1

2000 Regular Session
(0lr2488)

ENROLLED BILL

— Economic and Environmental Affairs/ Environmental Matters —

Introduced by **Senators Van Hollen, Hogan, Roesser, Frosh, Pinsky, Forehand, and Sfikas**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this __ day of _____ at _____ o'clock, _____ M.

_____
President.

Appendix X

CHAPTER _____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to submit certain reports to the General Assembly *by a certain date*; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing ~~a certain exception~~ *certain exceptions* to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; and generally relating to the waters in the Potomac River basin.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article *by July 1, 2002*:

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SENATE BILL 729

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; *and*

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment~~; and~~

~~(4) If Chapter ___ (H.B. 64) of the Acts of the General Assembly of 2000 takes effect, the report of the Task Force to Study the Minimum Flow Levels in the Potomac River~~.

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The water intake pipe will meet the following conditions:

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~~(1)~~ *(i)* The new pipe will replace a pipe already in use;

~~(2)~~ *(ii)* The new pipe cannot be used concurrently with the pipe to be replaced;

~~(3)~~ *(iii)* The new pipe ~~cannot~~ does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

~~(4)~~ *(iv)* The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow; *or*

(2) (i) The Secretary determines that the issuance of a permit is in the public interest; and

(ii) The water intake pipe will meet the following conditions:

1. The new pipe will replace a pipe already in use;

2. The new pipe cannot be used concurrently with the pipe to be replaced;

Appendix X

3. The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow;

4. The new pipe will not have the capacity to withdraw a greater quantity of water than the quantity of water that can be withdrawn by the existing intake; and

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SENATE BILL 729

5. The new pipe will incorporate a physical component, that cannot be modified without the consent of the Department of the Environment, that will limit the capacity of the pipe for maximum daily withdrawal to the maximum amount authorized by the appropriation permit issued to the owner of the pipe under § 5-502 of the Environment Article.

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other

Appendix X

provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

APPENDIX Y — DECLARATION OF MARK KRONENTHAL, II EXECUTED APRIL 27, 2000

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT

DECLARATION OF MARK KRONENTHAL, II

Appendix Y

I, Mark Kronenthal, II, declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration.

2. I attended the public hearing on February 22, 2000, of the Senate Economic & Environmental Affairs Committee of the Maryland General Assembly, concerning Maryland Senate Bill 729.

3. The sponsor of S.B. 729, Senator Christopher Van Hollen, stated at the hearing that his legislation, like the bill he proposed the previous year, was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. Senator Van Hollen said that his bill would permit Virginia to have an offshore intake in the Potomac River, but that it would limit the intake capacity to 205 million gallons per day ("MGD"), rather than the 300 MGD capacity sought in the permit application. He stated that the purpose of this limitation was to make sure "they are not fueling more development on the Virginia side of the river, which has been out of control." He stated that a further purpose of his bill was that, since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the right to withdraw water from the Potomac River without Maryland's consent, the limitation on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval.

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4. At the conclusion of the hearing, Senator Clarence W. Blount, the Committee Chairman, remarked that if "Virginia and Maryland were independent states, we would be at war over this."

5. I have also listened to relevant portions of the official audio recordings of the proceedings of the Maryland Senate from March 16, March 17 and March 21, 2000. Those proceedings are available to the public on the Internet at http://mlis.state.md.us/asp/listen.asp. When S.B. 729 as approved by the Senate Committee on Economic and Environmental Affairs was introduced to the full Senate on March 16, 2000 (3/16/00 Senate Recording at 23:41), the floor sponsor said that "what it addresses is the question relating to the County of Fairfax and Virginia's application for a new intake pipe." (3/16/00 Senate Recording at 26:00).

6. S.B. 729 was laid over on March 16, 2000 (3/16/00 Senate Recording at 28:24-29:7), amended on March 17, 2000 (3/17/00 Senate Recording at 51:21, 52:25-58:32), and again on March 21, 2000 (3/21/00 Senate Recording at 1:37:00), to provide an exception (in section 1(c)) that would allow three affected Maryland entities (Pepco, Alleghany Power, and Westvaco) to be exempted from the Bill's prohibition on the construction of water intakes in the Potomac River.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000 /s/ Mark Kronenthal, II

APPENDIX Z — DECLARATION OF CHARLIE C. CROWDER, JR. EXECUTED APRIL 27, 2000

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT

DECLARATION OF CHARLIE C. CROWDER, JR.

Appendix Z

I, Charlie C. Crowder, Jr., declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration. I am the General Manager for the Fairfax County Water Authority. I have extensive experience, over 27 years, in planning and operating large metropolitan area water systems. My academic background includes an undergraduate degree in civil engineering from the Virginia Military Institute and a graduate degree in public administration from George Washington University.

2. I attended the public hearings on February 22, 2000 before the House and Senate Committees to which the "Potomac River Protection Bills," Senate Bill 729, and House Bill 395 had been referred. J.L. Hearn, the Director of the Water Management Administration for the Maryland Department of Environment ("MDE"), testified that MDE supported both bills with some minor amendments. Mr. Hearn is the Maryland official who signed the ruling dated December 12, 1997 that denied the Authority's waterway construction permit, and he is the person who, thereafter, declined on behalf of his superiors in Maryland State government even to discuss the terms of any of several settlement proposals advanced by the Authority.

3. Prior to the hearing in the House Committee, I spoke with Mr. Hearn about S.B. 729. During our conversation, Mr. Hearn was asked — if the Van Hollen Bill were passed — whether MDE would issue a waterway construction permit for the Authority's project subject to the limitations set forth

in that Bill. Mr. Hearn said he believed that MDE would not issue the permit even for a project that was permitted by the Bill because of the positions that had already been taken against our project by his superiors. I understood him to mean Maryland Governor Glendening and Secretary of Environment Nishida.

4. I am familiar with the three studies referenced in both versions of the bill. Although the completion of these studies and their presentation to the General Assembly allegedly provides the justification for a new moratorium on construction of water intakes, to the best of my knowledge, none of them addresses any environmental or water supply issue implicated in the Authority's offshore intake project.

5. The Authority's proposed offshore intake project will not increase the Authority's capacity to withdraw water from the Potomac River. The capacity of the offshore intake (approximately 300 million gallons a day ("MGD")) would be 25% smaller than the capacity of the Authority's *existing* shoreline intake (approximately 400 MGD).

6. However, both H.B. 395 and S.B. 729 impose a moratorium on water intake construction that would limit the capacity of the Authority's proposed offshore intake to 205 MGD (the amount of the existing appropriation permit plus 5 million gallons a day). This limitation would frustrate the Authority's plan to construct one offshore intake to supply all its future Potomac River demand (300 MGD), and require the Authority to undertake in-river construction for a second time to enlarge the pipeline in the future (duplicating effort and costs) to complete its plan. While S.B. 729 on its

face would permit the Authority to have a replacement offshore intake that is no larger than the Authority's existing intake during the study moratorium, the requirement for a physical component in the pipe to limit water capacity imposes additional, unnecessary costs on the project and ratepayers and, in my view, gives Maryland dangerous authority to restrict the water supply of Northern Virginia.

7. In any case, it is my expectation, as recently confirmed by J.L. Hearn on February 22, 2000, above, that Maryland will continue to delay and impede the Authority's offshore intake project, regardless of the passage of H.B. 395 or S.B. 729, and regardless of results of the three studies referenced in those bills.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000 /s/ Charlie C. Crowder, Jr.

(4)

No. 99-129 Original

Supreme Court, U.S.
FILED
APR 21 2000
CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

Motion of the Audubon Naturalist Society for Leave to File an Amicus Curiae Brief Opposing the Commonwealth of Virginia's Motion for Leave to File a Bill of Complaint and Amicus Curiae Brief of the Audubon Naturalist Society

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April 21, 2000

Wilson-Epes Printing Co., Inc. – (202) 789-0096 – Washington, D. C. 20001

56pp

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INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully moves the Court to grant it leave to file this *amicus curiae* brief opposing the Commonwealth of Virginia's motion for leave to file a bill of complaint.[1] Established in 1897, ANS is the oldest naturalist organization in the Washington metropolitan area, with more than 10,000 members from Virginia, Maryland and Washington, D.C. ANS and its members have a considerable stake in this controversy because they use the very portion of the river where the Fairfax County Water Authority (the "Authority") proposes to build a mid-river intake.

In addition, ANS' Virginia members oppose the Commonwealth's claim that it represents them as *parens patriae*. To demonstrate this point, ANS has attached affidavits from two of its many members who oppose the Authority's proposed intake on environmental grounds and who object to the Commonwealth's claim to represent their interests as *parens patriae*. (Affidavit of Dr. John De Noyer (App. C); Affidavit of Marrie Ridder (App. D).) Dr. De Noyer is among the country's most respected geophysicists, with nearly 50 years of experience, and has served as the Chairman of the Fairfax County Environmental Quality Advisory Council. He also is a customer of the Authority and, as an elected member of the Herndon Town Council, represents an entire community that drinks the Authority's water. (App. C.) Affiant Marrie Ridder has been appointed Chairman of the Virginia Council on the Environment by two Virginia Governors and is a riparian

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The State of Maryland has consented to the filing of this brief, (Letter from Baida to Man of 5/23/00 (App. A)), but the Commonwealth of Virginia has refused to give its consent. (Letter from Fisher to Man of 5/28/00 (App. B).)

land owner on the Virginia side of the Potomac River. (App. D.)

ANS and its members have a long history of using this segment of the Potomac River. For well over 40 years, ANS has organized bird watching and guided nature tours near the location of the proposed intake. ANS also conducts kayaking and canoe trips along this portion of the Potomac. For example, a kayaking trip has been scheduled for this Fall that actually would traverse the area where the proposed intake would be built. Periodically, ANS also offers nature photography courses and graduate environmental courses for Virginia's teachers.

ANS depends on those activities to attract new members and promote member participation. These activities also provide a forum in which ANS can teach its members and the public about the importance of conservation. ANS has found that the natural environment provides the best classroom for teaching environmental values.

The Authority's proposed construction of the intake threatens the activities that ANS and its members enjoy and depend upon. The Authority's proposal involves blasting a trench that is 18 feet deep, 18 feet wide, and that would extend 725 feet into the center of the river. A hole also would need to be blasted in the center of the riverbed that would be large enough to accommodate an intake structure 35 feet wide. The construction would last several months, and there can be little question that blasting and the operation of heavy machinery would injure the aesthetic and recreational attributes that the area now provides ANS and its members. Among other detriments, kayaking and canoeing on the river would be severely limited if not rendered impossible by the serious danger posed by blasting and the related construction.

Aside from the short-term impacts from construction, ANS and its members are concerned that the construction and

operation of the intake will have serious long-term consequences. Blasting and construction would generate a great deal of sediment, which may have irreversible effects on the ecology. Once built, the intake may cause erosion of the riverbed, which could disturb the ecology by altering the flow and course of the river. Suction from the intake also may threaten the ecology through the entrapment and entrainment of aquatic life.

In opposing ANS' submission of its views as *amicus curaie*, the Commonwealth mistakenly suggests that any interest ANS has in this litigation "can be adequately represented by the State of Maryland." (App. B.) This contention lacks merit for two reasons. First, ANS has much narrower interests to protect in this case than the State of Maryland. To be sure, environmental preservation is an important goal that ANS shares with the State of Maryland, but the State, unlike ANS, represents countless other interests that it must balance against the goal of environmental preservation in making its decisions. This distinction alone would justify ANS' intervention in its own right,[2] and is more than adequate to justify ANS' submission of its own views as an *amicus curaie*.

Second, the State of Maryland cannot vindicate the interests of ANS' Virginia members when the Commonwealth alleges that it is acting as a class representative for those

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[2] *See, e.g., Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of Interior*, 100 F.3d 837, 844-45 (10th Cir. 1996); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303-04 (8th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994); *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The burden of making this showing for intervention is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (noting that "it is not unusual to permit intervention of private parties in original actions").

persons. If the Commonwealth is permitted to act as a representative for ANS' Virginia members as *parens patriae*, those persons could be bound by representations made by the Commonwealth in this litigation.[3] These members may be involved in future litigation against the Commonwealth or the Authority concerning this proposed intake and should not be bound by the representations of an adverse party. The Commonwealth's argument does not demonstrate that Maryland adequately represents ANS' interests, but conclusively demonstrates that the Commonwealth is an inappropriate representative of ANS' Virginia members in a *parens patriae* capacity.

STATEMENT OF THE CASE

Due to the rapid and largely unchecked development of Northern Virginia, considerable urban runoff empties into Sugarland and Broad Runs and then flows into the Potomac River. The adverse impact of this sedimentation on the Potomac River and its users is considerable; however, the Commonwealth's complaint focuses only upon the impact to the Authority. The Authority is concerned that its shoreline intake withdraws these waters and the associated sediment and it must filter out and dispose of the sediment at great expense. Assuming that Virginia's sedimentation problem will not improve, the Authority seeks to move its intake away

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[3] *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) "[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.' " (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F 3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

from the Virginia shoreline. The Authority does not seek an increase in its appropriation of water.

For more than twenty years, the Commonwealth has ignored its legal obligation to control sedimentation. Since 1977, it has been "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. . . ." 33 U.S.C. § 1251(a)(7) (1994). This Court has explained that this policy reflects Congress' belief that "'it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)).

The Clean Water Act places the burden of preventing nonpoint source pollution, including urban runoff, on the states in the first instance. The Commonwealth is required to identify areas where nonpoint source pollution, including "construction related sources of pollution," are present and "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(H). Congress made grants available to the states to assist them in this endeavor, *id.* at § 1288(f), and provided technical assistance from federal agencies. *Id.* at § 1288(h),(i). In addition, "Section 1329, added to the Act in 1987, requires States to adopt nonpoint source management programs and similarly provides for grants to encourage reduction in nonpoint source pollution." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

States are required to establish water quality standards that are designed, *inter alia*, to protect the water body's "use and value for public water supplies," 33 U.S.C. § 1313(c)(2)(A), and, where those standards are not met, states are required to set a total maximum daily load ("TMDL") for pollutants, including sediment, that would allow those standards to be achieved. 33 U.S.C. § 1313(d)(2). If EPA rejects the state's designation of an area where a TMDL is needed or the

proposed TMDL for that area, EPA is required to make those determinations. 33 U.S.C. § 1313(d)(2).

Once an area is designated and a TMDL is set, the Commonwealth must then devise and implement a plan that will bring the water body into compliance with the TMDL. 33 U.S.C. § 1313(e). EPA's anti-degradation policy prevents back-sliding after the standards are met by requiring, *inter alia*, that the Commonwealth use "all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 131.12(a)(2); *see also* 33 U.S.C. § 1313(d)(4)(B).

TMDL's are highly effective in restoring water quality. "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impaired by non-point source pollution." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994); *see American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (endorsing TMDL for the Great Lakes).

Although the Commonwealth concedes that nonpoint source pollution into Sugarland and Broad Runs compromises the Potomac's "use and value for public water supplies." 33 U.S.C. § 1313(c)(2)(A), it has not implemented the required controls. The Commonwealth's Bill of Complaint makes this concession explicit: "[t]he Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms. . . . These conditions significantly interfere with the smooth operation of the water treatment plant. . . ." (Bill of Compl. at 10, ¶ 21.)

The Commonwealth's failure to comply with the Clean Water Act is a pervasive problem. Although "Virginia was to have submitted initial TMDLs to EPA by June 26, 1979, and thereafter from 'time to time,' " *American Canoe Ass'n v. EPA*, 54 F. Supp.2d 621, 623 (E.D. Va. 1999), the

Commonwealth never has taken this obligation seriously. As one court recently discovered, "[i]n the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

After twenty years of noncompliance by the Commonwealth, environmental organizations sued EPA to set TMDLs for Virginia. *Id.* at 622. The District Court approved a consent decree that establishes a time-table for the Commonwealth to submit TMDLs and that compels EPA to issue TMDLs if the Commonwealth misses those deadlines. *Id.* at 629. As a result of the consent decree and the Commonwealth's acknowledgment of sedimentation problems in Sugarland and Broad Run, the Commonwealth is obligated to implement a program to control the sedimentation.

Despite the existence of the consent decree, the Authority evidently questions the Commonwealth's intention of honoring its obligations under the Clean Water Act. In assessing its future water needs, the Authority's model assumes that the sedimentation levels affecting the current shoreline intake will remain constant over the next 40 years. (Draft Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake (Dec. 1996) (App. E).) Consequently, the Authority proposes to spend $5.3 million on a new intake in the middle of the river to avoid the sediment contamination along the Virginia shoreline. *Id.* If the Commonwealth controlled sedimentation to even a modest degree, the Authority's report demonstrates that the intake would not be cost-justified.[4]

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[4] The Authority's study estimates the present value of solids and handling costs for the next 40 years at $7.2 million and the cost of constructing the proposed intake at $5.3 million. (App. E.) The conclusion in the

Because the Authority proposes building this mid-river intake on soil that is both owned by and within the territorial jurisdiction of the State of Maryland, Maryland law requires the Authority to seek a permit from the state. The permitting section of the Maryland Department of the Environment ("MDE") denied the Authority's permit as unnecessary because the Authority already provides water that meets and exceeds all state and federal water quality standards. (Va. App. L.)

The Authority filed an administrative appeal claiming that it is entitled to the permit under Maryland law and pursuant to various interstate compacts between Virginia and Maryland. A contested case hearing was held before an Administrative Law Judge ("ALJ") with Maryland's Office of Administrative Hearings and the ALJ will issue her opinion by June. Once the opinion is issued, the Authority and MDE will have the opportunity to file exceptions, and a Final Decisionmaker from MDE is expected to make a final decision this Fall. Either party may appeal that decision to an intermediate appellate court based upon the record developed before the ALJ. After exhausting state appeals, review of Compact issues may be had from this Court by Certiorari.

Authority's report that the project will save $1.9 million rests upon the assumption that the Authority's consumption of water from the shoreline intake will increase by a factor of three and one-third and that sediment levels will remain the same over the next 40 years. *Id.* Even a modest reduction in solids handling costs, spread out over 40 years, would eliminate the narrow margin of profitability for this project.

SUMMARY OF THE ARGUMENT

The central question presented by this case is whether riparian land owners along the Virginia side of the Potomac River who attempt to exercise property rights in Maryland are subject to Maryland's police power. Although Virginia views Maryland's preliminary decision not to authorize the Authority's proposed construction of a mid-river intake on the State of Maryland's property as "a direct challenge to Virginia's sovereignty," (Br. at 21) it is hard to conceive how this could be so. The Commonwealth has no jurisdiction in the State of Maryland, the undisputed site of the proposed intake construction.

This Court should refuse to entertain the Commonwealth's suit because its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). None of the Commonwealth's legal claims are ripe, and the Commonwealth would lack standing to bring them if they were. No Virginia riparian land owner is seeking to increase its appropriation of water from the Potomac, and only the Authority has proposed a construction project in the river. The Authority needs both a permit from MDE and a federal permit to begin construction, and neither has made a final permitting decision. Consequently, no ripe controversy now exists and it is uncertain whether one ever will.

In the event that a legal claim does become ripe, the Commonwealth is not the proper party to assert it. The rights that the Commonwealth asserts are not its own rights, but the rights of third-party riparian land owners on the Virginia side of the Potomac. The Commonwealth has not established that it has suffered or could ever suffer any direct injury as a result of the claims it makes here. The real party in interest would be the Virginia riparian land owner who has been denied a permit by Maryland.

This Court repeatedly has held that a state cannot manipulate the original jurisdiction of this Court by suing on behalf of the real party in interest. If this Court were to permit the Commonwealth to bring a *parens patriae* action, it would distort the Article III distinction between suits brought by "Citizens" and suits brought by "States." It also would circumvent the abstention doctrine that prevents the Authority from bringing a collateral federal suit after initiating litigation in Maryland, and would subject ANS' Virginia members to a class representative adverse to their interests.

I. The Commonwealth's Legal Claims Are Not Ripe.

The Commonwealth is frustrated that the Authority's legal claims have not yet been resolved in the Maryland litigation, and is seeking to litigate the Authority's claims collaterally before this Court. No case or controversy has arisen for Article III purposes, however, precisely because MDE has not decided whether or not to issue the permit. In the event that the Authority's contentions are as meritorious as the Commonwealth contends, there will be no need for the Court to exercise its jurisdiction. Nevertheless, it is important to recognize that no claim for a mid-river intake will be ripe until the Authority also obtains a permit from the Army Corps of Engineers ("ACE").

The Commonwealth also seeks to raise its legal claims by arguing that Virginia riparians are not obligated to seek Maryland's consent before increasing their appropriation of water from the Potomac. It would be frivolous for the Commonwealth to assert that these claims are ripe. The Commonwealth has failed to identify any Virginia riparian landowner who is now seeking or who intends to appropriate additional water from the Potomac in the near future.

A. No Controversy Concerning the Authority's Proposed Intake Will Be Ripe Unless ACE Issues Its Own Permit.

The Commonwealth apparently misunderstands the status of the Authority's dredge and fill permit before ACE. *See* 33 U.S.C. § 1344 (requiring an ACE permit). The Commonwealth advised the Court that "[t]he United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question." (Br. at 1.) In truth, the previously-issued permit was suspended by ACE more than two years ago. (Letter from Reardon to Sultan of 1/28/98 (App. F) ("Based on this new information, I have no recourse other than to suspend your Department of the Army permit. . . .").) ACE emphasized that "[f]ollowing this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit." *Id.*

ACE also has made it clear to ANS' counsel that the permit will not be reinstated as a matter of right if MDE ultimately issues a waterway construction permit. After ANS learned that ACE had approved the initial permit without following applicable procedure, ANS' counsel wrote to ACE requesting that the permit be revoked on numerous legal grounds. (Letter from Dubrowski to Zirschky of 12/22/97 (App. G).) ACE responded by informing ANS' counsel that the issue had been mooted because ACE already had suspended the permit. ACE then advised ANS' counsel that "[i]f the county resolves the State's concerns and obtains required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify, or revoke the Department of the Army permit." (Letter from Zirschky to Dubrowski of 3/5/98 (App. H).)[5]

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[5] In addition to the legal obligation for ACE to make a separate permitting decision now that the permit has been suspended, 33 C.F.R.

The fact that the Authority lacks the necessary authorization to construct the intake, regardless of any action taken or not taken by Maryland, demonstrates that this claim is not ripe. In *Anderson v. Green*, 513 U.S. 557 (1995), this Court dismissed a claim as not ripe under similar circumstances. In *Anderson*, this Court took jurisdiction to consider whether California's proposal to reduce Aid to Families with Dependent Children ("AFDC") payments to new residents violated the right to interstate travel. *Id.* at 559. For California to establish a payment differential for new residents receiving AFDC payments, Health and Human Services ("HHS") had to grant a waiver and such a waiver had been granted to California. *Id.* After the Court of Appeals had ruled in that case below, however, it vacated the HHS waiver in a separate proceeding. *Id.* Recognizing that no differential in payments would be made "[a]bsent favorable action by HHS on a renewed application for a waiver," this Court held that there is "no live dispute now, and whether one will arise in the future is conjectural." *Id.*

Similarly, in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), this Court rejected a challenge to a Forest Service management plan as allowing excessive logging because it was unclear whether future permits that were required for the logging to take place ultimately would be issued. The general Forest Service management plan would have allowed the logging in question, but the plan did "not itself authorize the cutting of any trees." *Id.* at 729. Because logging would require compliance with the management plan and future site-specific permitting, this Court held that legal challenges would have to be made to the site-specific permits that would

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§ 325.7(c), ACE's offer of a hearing to ANS would obligate ACE to provide a fair hearing even if the offer was made only voluntarily. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

come later – "at a time when harm is more imminent and more certain." *Id.* at 734; *see also New Hanover Township v. United States Army Corps of Eng'rs.*, 992 F.2d 470, 472-73 (3d Cir. 1993) (rejecting a challenge to a federal permit because no permit was obtained from the state).

As in *Anderson* and *Ohio Forestry*, the Commonwealth's claim against Maryland concerning the waterway construction permit is not ripe because future regulatory action is necessary for the project to take place. Until the Authority obtains the necessary permit to proceed with its project from ACE, there is no ripe claim against Maryland.

B. The Commonwealth's Request for an Advisory Opinion Concerning Water Appropriation Is Not Ripe.

Out of apparent concern that this Court would not take jurisdiction over the MDE permitting claim that already is being litigated in Maryland, the Commonwealth adds a request for this Court to rule that Maryland cannot regulate water withdrawals from the Potomac by Virginia riparians. The Commonwealth offers no evidence that any sort of controversy exists between Virginians and Maryland concerning water apportionment.

The Commonwealth rightly concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River. . . ." (Br. at 29.) Nevertheless, the Commonwealth complains that, if invoked, Maryland's permitting process for such appropriations is burdensome and time consuming. The Commonwealth has not identified any water appropriation permits that are pending and it is not clear that any will be sought in the near future. Consequently, no claim for appropriation is ripe. *See e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future").

II. The Commonwealth Lacks *Parens Patriae* Standing to Pursue The Authority's Claim for a Construction Permit.

The Commonwealth has no legally protected interest concerning the Authority's claim for a waterway construction permit, but is merely lending its name to the Authority in an effort to manipulate a forum before this Court where the Authority's claims can be heard. By its express terms, the Compact provision that the Commonwealth relies upon dealing with the "privilege" of making improvements in the river was given to the "*citizens* of each state . . . in the shores of the Patowmack river *adjoining their lands*." (Va. App. A (emphasis added).) Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit by MDE, it initiated litigation before a Maryland ALJ to obtain the permit. Plainly, it is the Authority and not the Commonwealth that is the real party in interest.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state can become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, § 1332. Even then, jurisdiction is limited to the lower federal courts. By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a State shall be a Party," U.S. Const., Art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue.

Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana*, 176 U.S. at 16; *compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states) *with* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland*, 451 U.S. at 737 ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil of California*, 405 U.S. 251, 258 n. 12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *State of Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana*, 176 U.S. at 16. The Commonwealth cannot circumvent this requirement by supplementing the Authority's claims with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more importantly, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits

> brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania, 426 U.S. at 665-66.

Having initiated litigation in Maryland, the Authority would be barred from raising these same issues in a collateral federal suit under numerous abstention doctrines, including *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315, 334-35 (1943), *Younger v. Harris*, 401 U.S. 37, 43 (1971), and their progeny. The principles of comity toward state tribunals that animate these doctrines would be circumvented if they could be avoided simply by having the Commonwealth reassert the Authority's arguments through a collateral proceeding in this Court. [6]

B. The Commonwealth Is an Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal challenges to a permit denial by Maryland. This Court cannot

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing a state to sue another state on behalf of its citizens. *See e.g., Maryland*, 451 U.S. at 745 n.21 (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil*, 405 U.S. at 259 n.12; *Cook*, 304 U.S. at 392-93.

hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

The Commonwealth's position also is antagonistic to the interests of Virginia riparians because it is responsible for the nuisance that affects their property. Equity does not allow a wrong-doer to represent its injured in shifting the responsibility for the injury to a third-party, particularly when the requested relief is incomplete. The Commonwealth should honor its own legal obligations and control nonpoint sources.

Applying *parens patriae* standing also would bind an enormous class to a litigating position that is hostile to the interests of many of its class members, including ANS' Virginia members who are customers of the Authority (App. C) and riparians on the Potomac. (App. D.); *see also supra* note 2 (listing cases finding *parens patriae* actions binding on the state's citizens). Allowing direct actions by individuals, like the one the Authority is pursuing, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

The Commonwealth does not claim standing on the basis of any direct injury to itself, and its claim of *parens patriae* standing on behalf of the people of Northern Virginia is not convincing. According to the Commonwealth, "[a]lthough it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action." (Br. at 22 n.8.) The only support the Commonwealth offers to buttress this claim are citations to two equitable apportionment cases. *Id.* (citing *Colorado v. New Mexico*,

459 U.S. 176 (1982) and *United States v. Nevada*, 412 U.S. 534 (1973)).

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment, but this is not such a case. This Court never has applied the equitable apportionment doctrine to a, river, like the Potomac, that is owned almost exclusively by one state. Moreover, the Commonwealth has assented to Maryland's jurisdiction to decide appropriation for more than 30 years, and this has become the settled course of conduct under the Compact. *See Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (acquiescence is binding); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (compact displaces equitable apportionment).

In addition, there are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth cannot identify even a single Virginia riparian who has a pending appropriation request from Maryland, and the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.)

In any event, the Commonwealth cannot leverage its standing claim for equitable apportionment to obtain standing to bring the Authority's claim for a construction permit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S.Ct. 693, 706 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hearing Brief of Fairfax County Water Authority (App. I at 47a-48a).)" The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. *Id.* at 47a. The Authority also claimed that the capacity of the treatment plant would prevent it from in-

creasing its appropriation. *Id.* at 48a. ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").

Finally, the Commonwealth does not assert standing on the basis of potential harm from *Cryptosporidium* or *Giardia*, and this Court should not be concerned by the alarmist claims asserted in the Commonwealth's statement of facts. (Br. at 11.) Contrary to the Commonwealth's suggestion, there is no evidence that consumers of the Authority's water are threatened by either *Cryptosporidium* or *Giardia* and there is no evidence that moving the intake would reduce any risk that may exist.[7] 1.2 million people consume the Authority's water every day and have done so for the four years since the construction permit was requested, yet the Commonwealth has not identified a single person to have been affected by *Cryptosporidium* or *Giardia* from drinking the Authority's water. This is not surprising. The Authority operates a state-of-the-art facility that should eliminate virtually all *Cryptosporidium* and *Giardia* with a combination of filtration, chlorination and ozonation. Neither *Cryptosporidium* nor *Giardia* even have been detected in the water the Authority distributes to consumers, and the Commonwealth's brief is devoid of any

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[7] The water at the center of the river is more likely to contain *Cryptosporidium parvum*, the only species of *Cryptosporidum* known to harm humans, than waters along the shore. *C. parvum* is passed by mammalian waste, which is less likely to be in urban runoff from Sugarland and Broad Runs than waters from the middle of the river. More likely sources of *C. Parvum* do exist farther up the river, such as wastewater treatment discharge points and animal farms, and those waters are deflected from the shoreline intake by the waters from Sugarland and Broad Run. Consequently, by moving the intake to the center of the river, the Authority is more likely to withdraw water contaminated by *C. parvum*. The Commonwealth does not even suggest that there would be less *Giardia* at the center of the river.

evidence to the contrary. As the Commonwealth reminds us, "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." (Br. at 11.) The Authority itself does not appear seriously concerned as it has not issued boil alerts or even targeted warnings to persons with compromised immune systems.

If made, the Commonwealth could not demonstrate *parens patriae* standing on the basis of these claims. "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of a serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. . . . The solution finally grasped was to saddle the party seeking relief with an unusually high standard of proof. . . ."). In addition, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical,' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The purported threat from *Cryptosporidium* and *Giardia* comes no where close to satisfying this standard.

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that this Court grant its motion for leave to file an *amicus curiae* brief and deny the Commonwealth leave to file a bill of complaint.

Respectfully submitted,

KATHLEEN A. BEHAN
CHRISTOPHER D. MAN *
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5616
Attorneys for Amicus Curiae
Audubon Naturalist Society
**Counsel of Record*

APPENDIX A

J. Joseph Curran, Jr.
Attorney General

Carmen M. Shepard
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Deputy Attorneys General

STATE OF MARYLAND
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March 23, 2000

Christopher D. Man, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re. *Virginia v. Maryland, No. 129 Original (S.Ct)*

Dear Mr. Man:

The State of Maryland consents to the submission of an amicus curiae brief to be filed in this case on behalf of the Audubon Naturalist Society.

Thank you for your consideration.

Sincerely,

/s/Andrew H. Baida
ANDREW H. BAIDA
Assistant Attorney General

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Telephone Numbers: (410) 576-6300 • D.C. Metro 470-7534
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APPENDIX B

Commonwealth of Virginia
Office of the Attorney General
Richmond 23219

Mark L. Early
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 – 786 – 2071

March 28, 2000

Christopher D. Man, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: 129 Original – *Commonwealth of Virginia v. State of Maryland*

Dear Mr. Man:

The Commonwealth of Virginia does not consent to the submission of an *amicus curiae* brief on behalf of the Audubon Naturalist Society in opposition to the Commonwealth's motion for leave to file a bill of complaint.

The Commonwealth believes the Audubon Naturalist Society has no legitimate interest in this dispute between two sovereigns, or in denying Virginia the forum provided by the United States Constitution. To the extent the Audubon Naturlaist Society may have an interest in the underlying issues, that interest can be adequately represented by the State of Maryland.

With kindest regards, I remain

Sincerely yours,

/s/ Frederick S. Fisher
Frederick S. Fisher
Assistant Attorney General

Cc: The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
The Honorable Parris N. Glendening
Governor of Maryland

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

No. 129, Original

AFFIDAVIT OF JOHN M. DE NOYER, PH.D.

JOHN M. DE NOYER, PH.D., being duly sworn, deposes and says:

1. I am a member of the Audubon Naturalist Society and live in Herndon, Virginia, where I am a customer of the Fairfax County Water Authority.

2. I have close to 50 years of experience in earth studies. I obtained both my masters (1953) and Ph.D. (1958) in geophysics from the University of California at Berkley and taught geology at the University of Michigan. From 1969-72, I was the Director of Earth Observation Systems for NASA and, from 1972-79, I was the Director of Earth Resources Observation Systems Program for the U.S. Geological Survey. I continued working for the U.S. Geological Survey as a research geophysicist from 1979 until 1991, when I retired from the agency, and I now privately contract my services as an earth sciences consultant.

3. I have considerable expertise in addressing environmental issues in Northern Virginia. From 1989-96, I was a member of the Fairfax County Environmental Quality Advisory Council and served as its Chairman from 1991-94. I also am a member of the Herndon, Virginia Town Council, where I have served since I was first elected in 1988.

4. I am strongly opposed to the construction of the mid-river intake structure that has been proposed by the Fairfax County Water Authority and I oppose the Commonwealth of Virginia's attempt to represent my interests before the Supreme Court. The problems that the Authority now faces from sedimentation are caused by the Commonwealth's failure to implement a non-point source control program in Northern Virginia. Rapid development is taking place in Northern Virginia without adequate land use planning or other appropriate environmental controls. Consequently, there is considerable urban runoff into Sugarland and Broad Runs and that runoff later empties into the Potomac River upstream from the Authority's present shoreline intake. The preferable solution to this problem would be to implement a non-point source program to control the cause of the sedimentation, rather than to address what is merely one of the impacts from the sedimentation.

5. Controlling the source of the sedimentation through non-point source controls would serve recreational and environmental interests, as well as the Authority's interest in reducing solids handling and disposal costs. The area where the proposed intake structure would be built lies on a portion of the river that is widely used for boating and other forms of recreation. The sedimentation in the river makes water-related activities more dangerous (particularly if the Commonwealth's assumption that *Cryptosporidium parvum* is present is correct) and adversely impacts the ecology. Controlling the sedimentation at its source advances everyone's interest, without requiring the Authority to spend millions of dollars on the proposed construction project.

By contrast, blasting a mammoth trench through the bed of the Potomac River would be extremely detrimental for recreational activities, especially activities that take place on the water. Perhaps more importantly, the blasting and related construction would generate additional sediment that could have serious long-term effects on the environment. Given the considerable risks that the proposed intake would cause and the availability of less invasive and more beneficial alternatives through non-point source controls, there is no adequate justification for constructing the proposed intake structure.

/s/ John M. DeNoyer, Ph.D.
JOHN M. DENOYER, PH.D.

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

No. 129, Original

AFFIDAVIT OF MARIE W. RIDDER

MARIE W. RIDDER, being duly sworn, deposes and says:

1. I am a member of the Audubon Naturalist Society and a riparian land owner along the Virginia side of the Potomac River down-stream from the point at which the Fairfax County Water Authority has proposed constructing a mid-river intake. My water is supplied from the Potomac River.

2. I have served as a board member on numerous environmental organizations, including the Virginia Parks Foundation, Environmental Policy Institute, Friends of the Earth, Chesapeake Bay Foundation and Piedmont Environmental Council. I also have held numerous environmentally-oriented governmental positions on behalf of the Commonwealth of Virginia. For example, I was appointed Chairman of the Virginia Council on the Environment by Governor Baliles, and later by Governor

Wilder, and Governor Dalton appointed me to serve on the Virginia Outdoors Federation.

3. I strongly oppose the Commonwealth and the Authority's efforts to construct a mid-river intake up-stream from my property. I do not want the Commonwealth to speak for me in this lawsuit. There are serious environmental implications associated with the heavy blasting of the river bed that this project would require. Certainly, it would disturb the beauty and tranquility of this area, which is widely used for recreation by myself, the Audubon Naturalist Society and its members, and countless others. Activities that take place on the river would be restricted, if not prohibited, during the construction. Depending upon how the intake is designed and operated, the project also may impact upon the aesthetic beauty of the river and threaten wildlife through the entrainment and entrapment of aquatic life. As a down-stream riparian land owner, I am concerned that these environmental impacts may adversely affect both the river and my property.

4. In my view, the proposed intake addresses only a symptom of the problem that is created by the Commonwealth' s failure to control non-point discharges of sediment into Broad Run and Sugarland Run. Even if the proposed intake were effective in resolving the Authority's concerns, the impacts from the sedimentation on the ecology of the river and for other users of the Potomac River would remain the same. Indeed, the heavy blasting associated with the construction of the intake may add to the sedimentation problems for the ecology and for other users of the river. For these reasons, the preferable solution to the sedimentation problem should focus on the source of the problem and not on one of its discreet effects.

/s/ Marie W. Ridder

MARIE W. RIDDER

APPENDIX E

Draft
Response to U. S. Army Corps of Engineers
Regarding U. S. Fish and Wildlife Service Comments
on Joint Application for Permit for Potomac Mid-River Intake

Prepared for
Fairfax County Water Authority

by

HARZA
Engineering Company

December, 1996

I. Introduction

This document provides the responses of the Fairfax County Water Authority ("Authority") to the comments of the U.S. Fish and Wildlife Service ("FWS") on the Authority's Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia for the proposed Potomac Mid-River Intake. The comments were transmitted to the Authority in a letter dated June 10, 1996 (Exhibit 1) from the U.S. Army Corps of Engineers, Northern Virginia Regulatory Section ("USACE").

The document includes five sections as follows:

- A short discussion of the purpose of the proposed Potomac Mid-River Intake;
- Response to the FWS comment on entrainment and impingement of fish eggs and larvae;
- Response to the FWS comment on best management practices;
- Response to the FWS comment on "done in the dry" construction; and

- Response to the FWS comment on conditioning of the permit.

II. Purpose of the proposed Potomac Mid-River Intake

The purposes of the proposed Potomac Mid-River Intake are to reduce the anticipated costs of handling solids generated in the Corbalis treatment plant, to reduce operation and maintenance requirements compared to the existing intake, and to improve the quality of raw water withdrawn for water supply purposes.

Construction of the proposed intake will not increase the Authority's ability to withdraw flow from the Potomac River. This capacity is limited by regulations and by several physical parameters including the dimensions of the pipelines between the existing intake and the raw water pumping station, the raw water pump characteristics and the physical dimensions of the raw water pumping station. The maximum amount that the Authority can withdraw from the Potomac River is regulated by the Interstate Commission on the Potomac River Basin during restricted times. Additionally the Authority must obtain permission from the State of Maryland Water Resources Administration to appropriate any water. Currently, the Authority is permitted to withdraw a yearly average of 100 million gallons daily (MGD) and a maximum daily flow of 200 MGD. The physical parameters limit the maximum flow rate that can be withdrawn from the Potomac River at normal water level to approximately 400 MGD whether the mid-river intake is constructed or not. The proposed mid-river intake is intended to supplement the existing intake and to operate alone or in tandem. Its design capacity is 300 MGD operating alone.

II.A Solids Handling Costs

Raw water withdrawn from the Potomac River contains suspended solids and sediments which are removed in the Corbalis Treatment Plant settling basin, dewatered in the plate presses, stockpiled on site and intermittently hauled off-site for disposal.

Approximately 30,000 tons of solids are estimated to be removed from the plant in an average year. Authority expenditures related to handling these solids are the costs of coagulants and flocculants in the settling basin, operational costs for the plate presses and disposal costs. It is estimated[1] that the annual costs of these items at the current rate of water consumption (approximately 60 MGD) are approximately $ 1.5 million, roughly equally divided between the costs of chemicals and the costs of disposal. The population of the service area, water consumption and annual solids disposal requirement are expected to increase over the next 40 years. The estimated average rate of water consumption in 2040 is 200 MGD and the annual solids disposal requirements are estimated to increase proportionately to approximately 80,000 tons. The present value of the disposal and related costs over this period will be approximately $26 million.

The Authority has observed that a large portion of the raw water sediment load is delivered to the treatment plant immediately following locally heavy storms. These storms cause erosion of soil and runoff into the Potomac River and its tributaries. The effect is pronounced in the two tributaries, Sugarland and Broad Runs, which enter the Potomac River on the Virginia side approximately 1 mile and 4 miles upstream, respectively, of the existing intake (located on the Virginia bank). The watersheds of these streams are undergoing development as the Washington metropolitan area expands. During storms, sediment plumes from these streams are noticeable and extend downstream of the intake to the submerged Seneca Dam. On many occasions, the water in the middle of the Potomac River is relatively clear compared to that along the banks. Aerial photographs and water quality sampling confirm the large difference in sediment and solids concentrations between the Virginia shore and mid-river

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[1] Harza Engineering Company, 1994, *Investigation of Improvements, Potomac River Raw Water Supply Intake*, for the Fairfax County Water Authority.

during local storms. The yearly average sediment concentration along the shore is estimated to be approximately 60 milligrams per liter (mg/l) compared to 30 mg/l in the middle of the river.[2] It is estimated that the amount of solids delivered to the treatment plant can be reduced by approximately 40 percent with a new intake located off-shore. The recommended location is 725 ft off-shore of the existing intake.

The savings in costs of handling solids resulting from the new intake would have a present value of approximately $7.2 million. The estimated reduction in the weight of disposed solids would be approximately 800,000 tons over 40 years.

The estimated cost of the mid-river intake facilities proposed in the permit application is $5.3 million. Thus, the Authority would realize a net benefit of $1.9 million, and this is the economic justification for the proposed intake.

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[2] Harza Engineering Company, 1996, *Preliminary Design Report, Potomac Mid-River Intake*, for the Fairfax County Water Authority.

APPENDIX F

January 28, 1998

Northern Virginia Regulatory Section
96-0017-40 (Potomac River)

Mr. Martin B. Sultan
Fairfax County Water Authority
8560 Arlington Boulevard
P.O. Box 1500
Merrifield, Virginia 22116-0185

Dear Mr. Sultan:

This is in reference to your Department of the Army authorization to construct a raw intake structure located in the river extending channel ward about 725 feet from the Virginia shoreline, a 10-foot diameter concrete pipe extending from the new intake to the existing intake, a connection to the existing intake, a clean-out shaft, and approximately 3200 feet of 9-foot diameter pipeline extending from the existing intake to the existing raw water pumping station. The project is located on the Potomac River, north of Lowes Island and approximately 2000 feet upstream of the Seneca Dam, in Loudoun County, Virginia and Montgomery County, Maryland.

On December 10, 1997, we received a letter from the Maryland Department of the Environment, stating that they had denied their authorization of the project. Based on this new information, I have no recourse other than to suspend your Department of the Army permit in accordance with Corps regulations outlined in 33 CFR 325.7(c). By regulation, you may request a meeting with me, within 10 days of the receipt of this letter, to present all pertinent information on this matter. Following this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit.

If you have any questions about this suspension notification, please Contact Mr. Ron Stouffer at (703) 221-6967.

Sincerely,

/s/ Robert H. Reardon, Jr.
ROBERT H. REARDON, JR.
Colonel, Corps of Engineers
District Engineer

APPENDIX G

LAW OFFICE
FRANCES A. DUBROWSKI
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WASHINGTON, D. C. 20036

TELEPHONE (202) 588-7618
FACSIMILE (202) 588-5185

December 22, 1997

Dr. John H. Zirschky, Assistant Secretary for Civil Works
U.S. Department of the Army
108 Army Pentagon, Room 2E570, MC OASA(CW)
Washington, D.C. 20310-0108

Re: Potomac River's proposed new water supply intake

Dear Dr. Zirschky:

On behalf of the Audubon Naturalist Society (ANS), I am writing to notify you of ANS' objections to Army Corps of Engineers permit #960017, which purportedly authorizes Fairfax County Water Authority ("Authority") to construct a new water supply intake and related structures[1] approximately 725 feet from the shoreline in the middle of the Potomac River, upstream of the Seneca Dam in Montgomery County, Maryland. We urge the Corps to reconsider and revoke this wholly illegal permit. This letter sets forth:

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[1] The related structures in Maryland waters include a 10-foot diameter concrete pipe connecting the new to the existing intake and a tee structure in the conduit approximately 75 feet from the new intake to facilitate future addition of a third intake. The Corps also authorized the Authority to construct a 9-foot by 3200-foot pipeline from the existing intake to the raw water pumping station along the Virginia shore in Loudoun County.

- why construction is barred or inadvisable due to lack of support from other federal and state agencies,
- why ANS believes this Corps permit is not authorized by statute, contrary to regulation, unsupported by the evidence, arbitrary and capricious, and unduly vague; violates ANS right to due process; and violates the President's Executive Order on Environmental Justice; and
- why ANS recommends the Corps reconsider this permit.

1. Lack of support among other federal and state agencies.

Construction of the proposed intake cannot proceed because the Maryland Department of the Environment (MDE) refused to grant the Authority's request for a nontidal wetlands and waterway construction permit. MDE determined that the Authority failed:

- to provide acceptable responses to technical design and construction issues (including the effects of blasting and construction-generated sediment, the size of the intake pipe, and its impact on aquatic life, public safety, aesthetics, and river currents),
- to substantiate the need for the project relative to future appropriations and impacts on the Potomac and other users, and
- to demonstrate that the proposed intake meets legal criteria for a permit (including serving "the best public interest").[2]

In addition, since the Authority claims the proposed intake is primarily intended to avoid sediment, nutrients, and pollutants

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[2] See letter dated June 25, 1997 from J.L. Hearn, Director, Water Management Administration, Maryland Department of the Environment, to Charlie Crowder, Jr., General Manager, Fairfax County Water Authority (Appendix A).

from Broad and Sugarland Runs upstream,[3] MDE concluded the public interest is best advanced by addressing the "contributing causes to the water quality problems in the vicinity of the existing intake," citing the success of such an effort at the Occoquan Reservoir, the Authority's other raw water source.[4]

MDE recommended that the Authority either pursue "a comprehensive basin-wide approach to the management and allocation of the water resources of the Potomac . . . using the Interstate Commission of Potomac River Basin for technical assistance" or withdraw its application.[5]

The Authority responded by supplementing its application. On December 10, 1997, MDE denied the amended application, citing public interest, environmental, and water management concerns. MDE noted that clogging of the existing intake (the ostensible reason for a new intake) occurred on average less than two days per year, only for several hours at a time, and did not affect treated water quality. Noting ongoing efforts to improve water quality in the area, potential interference with the river's wild and scenic attributes, and the absence of justification for an intake of this size and length in light of existing water allocation agreements, MDE advised the Authority to await the results of both the U.S. Geological Survey's Potomac River National Water Quality Assessment and the Interstate Commission on the Potomac River Basin's basin-wide water study before proceeding.[6]

Second, the President has directed the Corps to consult with the National Park Service when, as here, a proposed permit has

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[3] U.S. Army Corps of Engineers Statement of Findings accompanying Permit #960017, p. 1.

[4] See Appendix A and n. 2, *supra*.

[5] Id.

[6] Appendix B.

the potential to affect wild and scenic river values.[7] This portion of the Potomac is listed on the Nationwide Inventory of river segments that, after preliminary review, appear to qualify for inclusion in the National Wild and Scenic Rivers System. The National Park Service maintains that this segment is one of the largest free-flowing, relatively undeveloped, high order rivers in the northeast, containing an exceptional diversity of flow gradients, a significant and diverse juxtaposition of land, water, and vegetative elements, rare gorges, and cliffs up to 150 feet in height. The segment is of particular concern to the Service because the Service's National Capital Region manages the Chesapeake & Ohio Canal National Historic Park within and parallel to the river corridor. The Park, in turn, depends for the integrity of its structures on adequate water flow past the Authority's proposed intake. Consultation with the National Park Service is imperative because the Service has special environmental expertise to evaluate this application and because such consultation could avoid adverse effects until the river can be fully assessed for inclusion in the National Wild and Scenic Rivers System. The record, however, contains no evidence that the Corps consulted with the National Park Service on this permit.[8]

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[7] See Memorandum for Heads of Agencies, August 10, 1980. Responsibilities there given to the Heritage Conservation and Recreation Service were subsequently transferred to the National Park Service.

[8] On May 29, 1997, ANS sent the Corps a Freedom of Information Act request seeking "all documents relating to [this] application," including "the permit application, any records relating to the building of new structures in connection therewith by the Fairfax County Water Authority (including excavation and any associated structures), and NEPA documentation such as an environmental assessment, a list of those notified concerning the pendency of the application, the record of decision if any, the permit, and any post-permit communication between corps and the permitee." ANS analyzed all documents received in response to this request.

Finally, EPA has raised significant environmental concerns which, under the National Environmental Policy Act, "should be considered during the preconstruction period and not be put off until renewal of the current [water appropriation] permit," according to EPA.[9]

2. Summary of ANS' objections to the permit.

ANS believes that permit #960017 is not authorized by statute, contrary to regulation, unsupported by the evidence, arbitrary and capricious, and unduly vague; violates ANS' right to due process; and violates the President's Executive Order on Environmental Justice. Specifically:

A. Permit #960017 purports to fall within the ambit of "Abbreviated Standard Permit 92-ASP-18." However, the Authority's proposed intake does not meet the terms of "Abbreviated Standard Permit 92-ASP-18" because:

- ASP-18, by its terms, authorizes work solely "within the geographical limits of the Commonwealth of Virginia." Since the proposed construction of the new intake, the 10 foot diameter pipe, and the tee structure to accommodate a future intake will take place in Maryland waters, ASP-18 does not authorize this project.[10]

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[9] Letter dated August 29, 1997 from Thomas J. Maslany, Director, Water Protection Division, Region III, U.S. Environmental Protection Agency, to J.L. Hearn, Director, Water Management Administration, Maryland Department of the Environment. (Appendix C).

[10] *After* permit issuance, the Authority apparently realized the permit did not cover work outside Virginia and requested clarification. The Corps attempted to "modify" the permit by letter to authorize work in Maryland as well. (See letter dated May 5, 1997 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to the Fairfax County Water Authority.) The purported "modification" has no

- ASP-18, by its terms, authorizes work solely "under the regulatory jurisdiction of the Norfolk District" of the Corps. Since the proposed construction of the new intake, the 10 foot diameter pipe, and the tee structure to accommodate a future intak will take place outside of the Norfolk District (i.e., in Maryland waters), ASP-18 does not authorize this project."[11]

- ASP-18, by its terms, requires the Corps to determine that a project is "of minimal environmental consequence." The Corps

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validity because a permit cannot be modified by letter; instead, the Corps must follow the process outlined in its regulations. See 33 C.F.R. 325.7(a). Where, as here, significant increases in permit scope (such as inclusion of work in another State) are contemplated. Corps regulations require a new permit application. Id. In addition, there is no ASP-18 permit process anywhere in the nation outside Virginia. A similar permit process cannot be created in Maryland by letter. Instead, an ASP-18 for Maryland would require, among other things, a change to the Corps' permit regulations, an Environmental Assessment or Environmental Impact Statement addressing impacts within Maryland and its environs, adequate public notice and comment, and clear definition of the nature of the activities covered by the permit.

[11] The Norfolk District handled this application because the project originated in Virginia. See letter dated May 5, 1997 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to the Fairfax County Water Authority. Corps regulations, however, require regulatory compliance to be determined by the district where the discharge or impacts occur. 33 C.F.R. 230.5. This makes sense because it ensures familiarity with local regulations and environmental concerns and in particular here because the Baltimore District is responsible for ensuring an adequate, uninterrupted water supply to the District of Columbia via the Washington Aqueduct. Had the Corps followed correct process, it could have avoided many permit errors such as permit conditions which refer to Virginia, rather than the applicable Maryland, water quality standards and certification (see Paragraph C, below) and failure to consider the District of Columbia's water supply interests.

never made the requisite finding. Instead, the Statement of Findings accompanying permit # 960017 merely notes that permit conditions minimize the impacts of the original proposal; the Statement made no finding that residual impacts are of "minimal environmental consequence."

- If the Corps were to conduct the requisite examination, the permit could not issue because the proposed intake does not meet the essential qualifying test of ASP-18: i.e., it is not of "minimal environmental consequence." To the contrary, the proposed intake will have *significant* environmental consequences, including:
    - *Navigational hazards.* The proposed intake will involve an intake structure in a shallow, flat portion of the river as well as an above-water walkway from the bank to the intake. EPA has determined that both structures may present a hazard to navigation.[12]
    - *Scenic attributes.* EPA has determined that the project's above-water structural components may compromise the river's wild and scenic attributes.[13]
    - *Aquatic resources and habitat.* Construction of three proposed structures — the new intake, the 18-foot by 18-foot trench in the rock bottom of the

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[12] See Appendix C and n. 9, *supra*.

[13] Id.

river for the mid-river connecting pipe, and the 15-foot wide trench for the near shore, 3200-foot long conduit from the existing intake to the raw water pumping station — will generate sediment and necessitate blasting, disturbing aquatic species and habitat. The silt curtains proposed as mitigation will have limited effectiveness, as their manufacturer notes, for three reasons: (i) Silt curtains are designed for "quiescent environments," not blasting situations, (ii) "They are not designed to control fluid mud," and (iii) "Most of [the] fine-grained suspended material in the water column escapes with the flow of water and fluid mud under the curtains."[14] The record shows no analysis of the impacts of this material on bottom-feeding organisms. Finally, once construction is complete, EPA still worries that "especially during low flow periods, . . . these withdrawals . . . will . . . have a detrimental effect on the living resources of the Potomac River."[15]

- *Water allocation and quantity.* The Authority's current water consumption rate (60mgd) is substantially below

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[14] Fairfax County Water Authority Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake, December, 1996 (hereafter "Authority's Response"), Exhibit 10.

[15] See Appendix C and n.9, *supra*.

both its current water appropriation permit limits (100 mgd annual average, 200 mgd daily maximum) and its own physical intake capacity (400 mgd).[16] The proposed intake, designed to accom ıodate 300 million gallons per day and to operate alone or in tandem with the existing intake, would only increase the amount of excess capacity. However, the Authority projects that water consumption will increase to 300 mgd within 40 years,[17] precisely the excess capacity the Authority proposes to add now. In addition, the proposed pipeline will include a mid-river tee structure, approximately 75 feet from the new intake, to accommodate a third, future intake. With so much excess capacity and the initial structural components for a third intake in place, many parties, including EPA, have expressed concern the Authority will request a larger allocation if the new intake is constructed. EPA has questioned whether both intakes will "affect the natural flow of the river," especially during low flow periods.[18] The Authority apparently shares this concern since it is making provisions for a

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[16] Authority's Response, pp. 1 -2.

[17] Id. at 4.

[18] See Appendix C and n.9, *supra*.

third intake "to improve hydraulic performance at low Potomac River water levels when raw water withdrawals are near maximum."[19]

- *Secondary and cumulative impacts on development.* The watersheds along Sugarland and Broad Runs and elsewhere in the county are undergoing such intense development that the Authority expects water consumption to increase five-fold in 40 years.[20] Allowing the Authority to construct structural components for three water intakes will fuel this development and decrease pressure for water conservation measures. Excess capacity, among other things, caused EPA to term this a "significant environmental project [requiring] a thorough analysis of secondary impacts."[21]

- ASP-18, by its terms, requires the Corps to determine that a project is not "contrary to the public interest." The Statement of Findings accompanying permit # 960017 makes this claim but could not possibly be sustained because:

    - The Maryland Department of the Environment had not yet finished its re-

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[19] U.S. Army Corps of Engineers Statement of Findings accompanying Permit # 960017, p.1.

[20] Authority's Response, pp.2-4.

[21] See Appendix C and n.9, *supra*.

view, so the Corps could not consider the State's interests.

- The interagency review was so cursory as to be virtually nonexistent. Indeed, the record contains no evidence that several key agencies were even notified of the application. (See Paragraph I below.)
- The public, not properly notified of this proposed permit, did not have an appropriate opportunity for input. (See Paragraph I below.)
- The Corps did not conduct the environmental analysis required by the National Environmental Policy Act. (See Paragraph B below.)
- The permit violates numerous constitutional, statutory, regulatory, and executive branch requirements, as set forth more fully below.
- The proposed intake is, in fact, "contrary to the public interest." Both EPA and MDE have found the potential adverse environmental impacts to be significant and not justified by any showing of need. Indeed, EPA found:

> "The [Authority] notes that the existing intake is prone to clogging due to aquatic plant growth along the shallow banks, a higher sediment load along the banks (which may increase the potential for water borne dis-

> ease), and water freezing along the shallow banks in winter blocking the intake. A significant portion of the problem with aquatic plant growth may stem from excess nutrients from upstream runoff. Similarly, excess sediment may be the result of discharges upstream from development and runoff. The [Authority] and other agencies should work cooperatively to prevent and control upstream erosion at the source. Building a new intake cannot be a substitute for proper management of these problems at their source upstream."[22]

B. Permit #960017 violates the National Environmental Policy Act (NEPA) and implementing regulations because:

- NEPA requires either an Environmental Assessment (EA) or Environmental Impact Statement (EIS) for activities such as this which do not qualify for a categorical exclusion. See, e.g., 33 C.F.R 230.6, 230.7(a), and 325.2(a)(4). The Corps failed to require either an EA or EIS before issuing permit #960017. Instead, the Corps appears to have relied upon a purported "Final Environmental Assessment" of ASP-18 itself. This document cannot substitute for an assessment of the proposed intake because:

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[22] Id.

- The document does not identify a class of activities which includes the proposed water intake. To the contrary, the Corps claims that the nature of the activities grouped under ASP-18 "var[ies] so widely" that identification is "not practicable." Because the Corps did not identify proposed water intakes as subjects for evaluation, the final document does not take a "hard look" at the impacts of, and alternatives to, such intakes as NEPA requires.
- The thrust of this document is entirely intra-State. The document considers only environmental impacts and alternatives within the Commonwealth of Virginia, whereas this construction takes place in Maryland waters and has environmental impacts both within Maryland and the District of Columbia.

- ASP-18 itself violates NEPA. The Corps' purported Final Environmental Assessment of ASP-18 is wholly inadequate because:
  - It was issued without the public input and interagency coordination required by NEPA. Instead, the Corps relied on purported public review of "General Permit #18" 15 years ago.[23] This cannot suffice for compliance with NEPA because:
    - ASP-18 differs from GP-18 in key respects: it has no expiration date, in-

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[23] See Final Environmental Assessment for Norfolk District Abbreviated Standard Permit, ASP-18, p. 3.

volves a different interagency review process, and different permit conditions, as the Corps acknowledges.[24] These differences were sufficient to compel the Corps to prepare a "Final Environmental Assessment" before issuing ASP-18.

- In the intervening 15 years, the composition of the public, the nature and understanding of the environmental impacts, and the applicable regulatory requirements have changed.
- In any event, ASP-18 was designed by the Corps to apply to "many" projects which do not meet requirements for nationwide or regional permits.[25] These disparate projects are not "similar in nature" and therefore not eligible for general permits. See 33 U.S.C. 1344(e) and 33 C.F.R. 322.2(f).

- This purported assessment does not examine the impacts of, and alternatives to, any defined group of activities. Instead, the Corps admits that the nature of the activities grouped under ASP-18 "var[ies] so widely" that identification is "not practicable."[26]

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[24] See Public Notice of April 29, 1997 announcing ASP-18.

[25] See Final Environmental Assessment for Norfolk District Abbreviated Standard Permit, ASP-18, p.1.

[26] Id., p. 3.

- This purported assessment does not identify and compare "all reasonable alternatives" as required by NEPA. To the contrary, it considers using only Corps-issued individual permits or State-issued regional permits.[27] It never considers the obvious alternative of categorizing some of these varied activities and deciding upon the suitability of abbreviated permitting in light of category-wide cumulative impacts.

- This purported assessment uses an inappropriate test for determining environmental significance, excluding "issues of only local or regional significance."[28] NEPA does not limit EIS requirements only to nationally significant impacts, but may require an EIS even for activities of purely regional or local significance.

- CEQ and Corps regulations require that agencies "rigorously explore and objectively evaluate *all reasonable alternatives*" to a proposal, including alternatives "not within the jurisdiction of the lead agency." 40 C.F.R. 1502.14(a), (c), and (d) and 33 C.F.R. 230. 1. The Evaluation of Alternatives[29] affixed to this permit application in lieu of an EA or EIS does not meet this standard because:

    - The "evaluation" purports to address erosion control but, in so doing, analyzes only "*local government* enactment and enforce-

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[27] *Id.*

[28] *Id.*, p.1.

[29] See Attachment 7 to the permit application.

ment of erosion control ordinances," rather than federal and State action such as:

- using the Clean Water Act's water quality standards and nonpoint source provisions to control pollution from Sugarland and Broad Runs.
- using the Coastal Zone Act Reauthorization Amendments of 1990 provisions on nonpoint source management measures in the vicinity of Sugarland and Broad Runs.
- using the Interstate Commission on the Potomac River Basin's authority to control the pollution from Sugarland and Broad Runs. The Commission has broad-reaching statutory authority to "promot[e] uniform laws, rules, or regulations for the abatement and control of pollution of streams and the utilization, conservation and development of the water and associated land resources" in the basin, to "make . . . reasonable minimum standards" for waste treatment and stream cleanliness, and to "establish reasonable physical, chemical and bacteriological standards of water quality."
- adopting a comprehensive basin-wide approach to the management and allocation of the water resources of the Potomac, as suggested by MDE.

- The Authority did not analyze other obvious alternatives such as:

- reducing nutrient loads from poultry farmers in the upper watershed,
- enhanced maintenance of the existing water intake (because, the Authority claims, this alternative would not reduce the Authority's solids handling costs),
- water conservation measures to reduce projected water consumption rates and minimize dependence on the Potomac River.

- The Evaluation of Alternatives is not credible. The Authority claims erosion control measures will achieve only "limited success" (i.e., a 10-20% reduction in solids), but provides no basis for this conclusory appraisal.

- The Corps did not comply with its own practice which has subjected intakes of considerably less volume to detailed NEPA analyses.

C. Permit #960017 violates the Clean Water Act and implementing regulations because:

- It was issued without the requisite 401 certificate (or waiver).
- It only requires compliance with a water quality certification from "the Commonwealth of Virginia," whereas the appropriate certifying agency for the intake, connecting pipe, and tee structure is the State of Maryland. (See ASP-18, Special Condition # 6.)
- It only requires compliance with the water quality standards and regulations of the "Commonwealth of Virginia," whereas the appropriate standard-setting and regulatory body for the intake, connecting pipe, and tee

structure is the State of Maryland. (See ASP-18, General Condition # 11.)

- It was issued without requisite notice to the District of Columbia, contrary to sections 401, 402, 404, and 502(3) of the Clean Water Act.[30]

D. Permit #960017 violates the Rivers and Harbors Act.

- The Corps has determined that Section 10 of the Rivers and Harbors Act of 1899 and the public interest require a Low Flow Allocation Agreement as a precondition for permitting water intake structures on this portion of the Potomac to ensure that water quantity is adequate to meet demands during low flow periods.[31]
- The Low Flow Allocation Agreement relied upon here is wholly inadequate to fulfill this statutory precondition because:
    - It is outdated, having been signed in 1978 and not updated since.
    - It does not account for the Interstate Commission on the Potomac River Basin's more recent projections that water consumption will produce a 21-100 mgd deficit in needed Potomac River system flow by the year 2020.[32]

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[30] See, e.g., the Statement of Findings accompanying permit #960017, Interagency Coordination Form Distribution List, and Public Notice mailing list.

[31] See text of Low Flow Allocation Agreement.

[32] 1995 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, April, 1996, prepared by the Section for Cooperative Water Supply Operations on the Potomac of the Interstate Commission on the Potomac River Basin to implement the study required by the Low Flow Allocation Agreement.

- It does not restrict allocations until withdrawals equal 80% of the total daily flow of the river,
- It does not treat anything short of a completely dry river (i.e., 0% flow) as an "emergency,"
- It bases allocations on prior consumption, penalizing those who engage in effective water conservation.

E. Permit #960017 violates the Coastal Zone Act Reauthorization Amendments of 1990 and implementing regulations because:

- It was issued without the requisite certification that the proposed intake complies, and will be consistent with, the Coastal Zone Management Act as amended. The 1990 amendments to this Act extend the geographic reach and strengthen the nonpoint source protections of the prior law; the record contains no indication that the Corps considered the applicability of these amendments here.

F. Permit #960017 is not sufficient to comply with the Corps' responsibilities regarding the National Historic Preservation Act.

- The permit application indicates that the Authority never contacted the Virginia Department of Historic Resources and does not know whether there is a report on file with that agency concerning this property.
- The archeological survey the Authority supplied has not been updated in almost 20 years.
- The conduit connecting the proposed with the existing intake would appear to require construction and blasting in an area identified as "44LD3" in the Authority's 1979 archaeological report. The report describes this area as a "major site that extended to a depth of at least

80cm below the existing ground surface, . . . [was] continuous throughout the length of the [existing] intake easement, . . . continued laterally beyond the Fairfax County Water Authority easement," and required mitigation. The report further recommended an "excavation program," "final analysis," and "full literature search on Potomac River archeology." The permit application does not contain the results of any of these efforts.

- In short, although the permit requires notice to the Corps before the Authority knowingly impacts historic properties, neither the permit nor the permit process required the applicant or the Corps to examine the possibility of such impacts.

G. Permit # 960017 is unsupported by the evidence and arbitrary and capricious for the foregoing reasons and because none of the critical allegations in the permit application are supported by adequate documentation in the record, including:

- the existence of a clogging problem with the current intake,
- the limited utility of erosion control and other water quality management measures in reducing sediment, nutrients, and other pollutants in the vicinity of the current intake,
- the need for a new intake,
- the need for an intake designed of this size and distance from the shoreline,
- the ability of a new intake to improve water quality,
- the purported savings in solids handling costs from the new intake, and
- the effectiveness of the proposed mitigation.

H. Permit #960017 is unduly vague because:

- The letter accompanying permit #960017 warns the Authority that a change in "any aspect of your proposal" requires permit modification.[33] The letter does not identify the Corps' position on whether increased withdrawals constitute a change requiring permit modification.

- The permit does not contain a condition preventing increased water withdrawals without an application for permit modification. Initially, the Corps insisted on such a provision.[34] When the Authority objected—ostensibly because Maryland Department of the Environment must first authorize withdrawals, the Corps withdrew the provision.[35] MDE's water appropriation

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[33] See letters dated January 31, 1997 and May 27,1997 from Bruce Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers, to Fairfax County Water Authority.

[34] The Corps informed the Authority: "The permit conditions should state that the conditions of the Maryland Department of the Environment regarding the maximum amount of water that can be withdrawn from the Potomac River are a condition of this Department of the Army permit. If, at any time, Fairfax County Water Authority proposes to modify this permit for an additional amount of water to be withdrawn, such a proposal shall be submitted as a permit modification. The modification will be forwarded to the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Environmental Protection Agency for review. The Corps will fully consider all comments received before making a decision on whether or not to modify the permit." (See letter dated June 10, 1996 from Bruce F. Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers to Fairfax County Water Authority.)

[35] The Authority also argued that the Potomac River Low Flow Allocation Agreement adequately regulated withdrawals by requiring the Authority to reduce water consumption during a " restrictions stage." However, these restrictions only apply when total daily withdrawal equals or exceeds 80% of the river's total daily flow. These emergency provisions do not protect long-term water flow and aquatic resources and are no substitute for adherence to

statute, however, focuses on "waters of the State." It is not clear that MDE will interpret the statute to protect the interests of the District of Columbia. In any event, MDE's review does not satisfy the Corps' statutory responsibilities to ensure an adequate, uninterrupted flow of water to the District of Columbia and a wise use of the Potomac resource.

I. Permit #960017 violates due process because:

- Permit #960017 was issued without statutory authorization; in contravention of NEPA, the Clean Water Act, the Rivers and Harbors Act, the Coastal Zone Act Reauthorization Amendments of 1990, and the National Historic Preservation Act; and without complying with the Corp's own permit regulations. 33 C.F.R. 325.2.
- The "Public Notice" accompanying permit #960017 was inaccurate and misleading. Specifically:
    - The notice did not apprise reviewing agencies or the public of the possibility that the proposed intake could be used for increased water withdrawals. The notice merely stated: "The purpose of the project is to provide . . . an alternative intake structure." The notice failed to mention that the alternative structure was designed to be used *in tandem* with the existing intake, increasing the capacity for water withdrawals.
    - The notice states: "Comments are used in the preparation of an Environmental Assessment and/or an Environmental impact Statement pursuant to the National Environmental Policy Act." In

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the Corps' statutory responsibilities for adequate planning, management, and environmental analysis in advance of emergencies. (See also Paragraph D above.)

fact, the Corps planned to bypass both an EA and EIS by using the ASP-18 process. The notice did not alert reviewing agencies or the public to the absence of any NEPA-type deliberative process.

- The notice states: "The Corps of Engineers is soliciting comments from the public; Federal, *state, and local agencies* and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity." In fact, the Corps distributed the notice to only four state agencies, all located in Virginia.[36] The record contains no evidence the notice was sent to other affected agencies, including:
    - the District of Columbia, which uses the Potomac as its sole water source,
    - the National Capital Planning Commission,
    - Montgomery County
    - Prince George's County
    - the Interstate Commission on the Potomac River Basin.
- Permit #960017 was issued without adequate public notice. No notice appeared in the Federal Register, and the record shows no evidence of notice in a newspaper of general circulation in the affected area. Instead, the Corps apparently mailed notice only to a limited list of parties who had previously registered to receive information about the activities of the *Norfolk* District of the Corps. This practice was insufficient to notify residents of Mary-

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[36] Three federal agencies—EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service—also received copies.

land and the District of Columbia, who would not normally follow the activities of the Norfolk District, about the pending application.

- Permit #960017 was issued without appropriate interagency review.
    - As noted earlier, the public notice was inaccurate and misleading and the record contains no evidence that the National Park Service was even consulted, contrary to 40 C.F.R. 1501.5 and 1501.6.
    - The "fast track" (i.e. 16 day) interagency review process compounded these errors, preventing federal agencies from focusing effectively on the possibility and magnitude of increased water withdrawals.
    - Since the permit issued, at least one federal agency (EPA) has expressed concern over the detrimental effects increased withdrawals could have on both the natural flow of the river and the river's living resources.
- Permit #960017 is unduly vague. (See Paragraph H above.)

J. Permit #960017 violates the President's Executive Order on Environmental Justice (Executive Order #1 2898, issued February 11, 1994).

- The Executive Order directs federal agencies to ensure that their actions: a) do not discriminate on the basis of race, color, or national origin, b) address "disproportionately high and adverse human health or environmental effects" on minority and low income populations, and c) provide additional outreach, notification, and opportunities for input in the NEPA process to minority and low income communities.

- Both CEQ and EPA have issued draft guidance for complying with the Executive Order. Both guidance documents direct federal agencies to apply the Executive Order's analytical and outreach provisions whenever the percent of minority or low income people in the area potentially affected by a proposed project equals or exceeds 50% of the population.
- The District of Columbia is directly affected by the proposed project since the District draws its water supply solely from the Potomac River immediately downstream of the proposed water intake and the District, along with Maryland and Virginia, is a signatory to the Potomac River Basin Compact and the Potomac River Low Flow Allocation Agreement.
- The District of Columbia meets the definition of a minority or low income population for purposes of Executive Order #12898 because the District has a population that is roughly 67% African-American and has large numbers of Hispanic and Asian residents.
- Contrary to the Executive Order, the Corps in issuing permit #960017 did not address the potential impacts of the proposed project on the downstream District of Columbia. The Statement of Findings accompanying permit #960017 makes no mention of:
  - Executive Order #12898,
  - the principles of environmental justice,
  - potential impacts on the District of Columbia, or
  - the District of Columbia' s interest in the proposed project.
- Contrary to the Executive Order, the Corps in issuing permit #960017 apparently made no attempt to notify and obtain comment from the District of Columbia

government or environmental justice community representatives within that jurisdiction.[37]

3. ANS' recommendations to the Corps.

Because MDE's refusal to issue a permit bars construction of the proposed intake, ANS has not otherwise challenged permit #960017. ANS, however, reserves the right to do so should the Authority persuade MDE to issue a waterway construction permit, allowing the proposed intake to proceed. In the meantime, ANS respectfully requests that the Corps reconsider this permit.

ASP-18 explicitly notifies a permittee that the Corps may re-evaluate a permit whenever the supporting information or data prove to be "false, incomplete, or inaccurate" or when "significant new information surfaces which [the Corps] did not consider in reaching the original decision." (See ASP-18, General Conditions # 20 and 23).

At the time the Corps issued permit # 960017, it lacked the benefit of the significant issues of inadequate technical design and construction, unsubstantiated project need, interference with wild and scenic river attributes, absence of public interest, and availability of alternative pollution control solutions raised by Maryland Department of the Environment in its June 25, 1997 and December 10, 1997 letters. (Appendices A and B). The Corps also lacked the benefit of the significant issues of potential navigational hazards; interference with wild and scenic river attributes; disturbance of aquatic resources and habitat; interference with water allocation, quantity, and river flow; and inadequate analysis of secondary and cumulative impacts on development raised by EPA in its August 29, 1 997 letter. (Appendix C). Finally, due to inadequate public notice and comment, the Corps lacked the benefit of the legal and factual analysis out-

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[37] See Statement of Findings accompanying permit #960017, Interagency Coordination Form Distribution List, and Public Notice mailing list.

lined above. Any one of these letters gives the Corps ample reason to reevaluate this permit.

Reconsideration of this permit is essential to serve the public interest. Reconsideration will:

- prevent irreversible environmental damage,
- protect the wild and scenic attributes of this magnificent river,
- promote sound, comprehensive, and basin-wide management and allocation of the Potomac's precious water resources,
- preserve the region's economic future by preserving the water supply which is key to development and growth,
- foster pollution prevention,
- avoid navigational hazards,
- advance environmental justice,
- allow appropriate public participation in the Corps' decision-making,
- support the State of Maryland's statutorily protected right (under Section 401 of the Federal Clean Water Act) to make water quality decisions free of the pressure of a prior federal imprimatur, and
- fulfill the Corps' statutory responsibilities.

Reconsideration of this permit will not prejudice the applicant. ASP-18 expressly notifies the permittee of the "need to obtain other Federal, state or local authorizations required by law." (See ASP-1 8, General Conditions #21.) In addition, the Corps notified the Authority that "this permit is not valid until

you have obtained a 401 certificate or waiver."[38] The Authority's failure to obtain either a nontidal wetlands and waterway construction permit or a 401 certification from the State of Maryland bars construction, leaving the permit without operative effect so long as the State of Maryland takes no further action.

We request that you meet with us as promptly as possible to discuss how you intend to proceed to reevaluate this permit. The Potomac River is the nation's showpiece. We look forward to working with you to protect its future.

Sincerely,

/s/ Frances A. Dubrowski,
FRANCES A. DUBROWSKI,
Attorney for the Audubon
Naturalist Society

cc: Martin B. Sultan, Director, Engineering and Construction Division, Fairfax County Water Authority
Joseph Ballard, Chief of Engineers, U.S. Army Corps of Engineers
Donald Barry, Assistant Secretary for Parks, Conservation, and Wildlife, Department of Interior
Dinah Bear, General Counsel, CEQ
Colonel Bruce A. Berwick, District Engineer, Baltimore District
Jonathan Z. Cannon, General Counsel, EPA
Terry Carlstrom, Director, National Capital Region, National Park Service
Doreen Cook, Attorney Advisor, DC Environmental Regulation Administration

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[38] Letter dated May 27, 1997 from Bruce F. Williams, Chief. Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers, to Fairfax County Water Authority.

Honorable J. Joseph Curran, Jr., Attorney General, Maryland

Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers

John M. Ferren, Corporation Counsel, District of Columbia

John R. Griffin, Secretary, Maryland Department of Natural Resources

J.L. Hearn, Director, Maryland Water Management Administration

Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, EPA

John Leshy, Solicitor, Department of Interior

Thomas Maslany, Director, Region III Water Protection Division

Michael McCabe, Regional Administrator, Region III EPA

Honorable Kathleen A. McGinty, Chair, Council on Environmental Quality

Jane Nishida, Secretary, Maryland Department of the Environment

Robert Perciasepe, Assistant Administrator for Water, EPA

Colonel Robert H. Reardon, Jr., District Engineer, Norfolk District

Robert Stanton, Director, National Park Service

Angelo Tompross, Administrator, District of Columbia Environmental Regulation Administration

Bruce Williams, Chief, Northern Virginia Regulatory Section, Norfolk District, U.S. Army Corps of Engineers

APPENDIX H

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY

CIVIL WORKS
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05 Mar.1995

Mr. Frances A. Dubrowski
11 Dupont Circle, N. W.
Suite 800
Washington, D. C. 20036

Dear Mr. Dubrowski:

This is in response to your letter of December 22, 1997, regarding your concerns about the Army Corps of Engineers Norfolk District issuance of a permit to the Fairfax County Water Authority to construct a new water supply intake and related structures in the Potomac River. You urged the Corps to reconsider and revoke this permit.

The District confirms that they issued this permit after providing an opportunity for public comment. Although no comments from the public were received, the District included several special conditions in the permit, to minimize the effects of the construction and the operation of the intake on aquatic resources.

A condition of the District's permit required the county to obtain all necessary State permits before commencing construction. As indicated in the copy of the December 10, 1997, correspondence from the Maryland Department of the Environment, the State denied the Fairfax County Water Authority's application for a nontidal wetlands and waterways permit. Because of this denial, the District has suspended the Department of the Army permit.

If the county resolves the State's concerns and obtains the required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify, or revoke the Department of the Army permit.

In light of these circumstances, I do not believe that intervention in the District's action is warranted. However, if you have additional questions about Corps Regulatory Program, please contact Mr. John F. Studt, Chief, Regulatory Branch, at (202) 761-0199.

Sincerely,

/s/ John Zirschky
JOHN H. ZIRSCHKY
Acting Assistant Secretary of
the Army
(Civil Works)

APPENDIX I

MARYLAND:

OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF

FAIRFAX COUNTY WATER AUTH./
POTOMAC RIVER INTAKE

BEFORE THE HON. NEILE FRIEDMAN

AN ADMINISTRATIVE LAW JUDGE OF THE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 98-MDE-WMA-116-044

PRE-HEARING BRIEF OF
FAIRFAX COUNTY WATER AUTHORITY

The Fairfax County Water Authority (the "Authority") submits this pre-hearing brief, pursuant to Judge Friedman's letter ruling of September 4, 1998. Following a series of meetings, the parties have narrowed the substantive legal issues involved in this contested case hearing to the following: the effect of the Compact of 1785 and its progeny (the "Compact") on the Authority' s right to build the intake; the applicable legal standard under section 5-507 of the Environmental Article concerning the issuance or denial of the waterway construction permit; and whether MDE has waived its authority to refuse to issue a section 401 certificate under the Clean Water Act. This memorandum sets forth the Authority's position on these purely legal issues. It also argues that the Administrative Law Judge should rule that the adequacy of the future water supply for the Washington Metropolitan Area is not relevant to whether the requested permits should be issued.

THE STIPULATIONS OF THE PARTIES

In a written Stipulation of the Parties, filed on October 9, 1998, MDE and the Authority resolved a number of previously disputed issues. The first four of these stipulations affect the

scope of the legal issues to be resolved by this tribunal. A copy of those Stipulations is attached as Exhibit I.

* * * *

This political pressure is no doubt responsible for MDE's refusal to concede that the adequacy of the future water supply for the Washington Metropolitan Area is *not* a proper issue for consideration in this contested case hearing. As noted above, a number of Maryland politicians had attacked the Authority's intake application during the comment period as some sort of covert or untoward attempt by Virginia to "grab" more than its fair share of water, suggesting that approval of the permit for the intake might result in a water shortage for Marylanders sometime in the future. The Authority believes, for the reason set out more fully below, that this attack is without basis in fact or law, and that the Administrative Law Judge should rule in advance of the hearing that this issue is not relevant to the permit decision in question.

ARGUMENT

A. THE ADEQUACY OF THE FUTURE WATER SUPPLY FOR THE WASHINGTON METROPOLITAN AREA IS NOT RELEVANT IN THIS PROCEEDING.

Most of the critics of the Authority's proposal for an offshore intake complained that it would allow Virginia to take more than its "fair share" of water from the Potomac River, to the detriment of residents of Maryland. This criticism reflected a complete lack of understanding not only about the existing water supply and coordination agreements in place to ensure an adequate water supply, but also about the mechanics of adding a second intake structure to the Authority's existing mixing chamber and conduit.

Moroever, in April 1996, MDE *approved* the Authority's revised water appropriation permit, explicitly recognizing that water could be taken both from the shore and from the proposed offshore intake. Ex. 4. This proceeding, by contrast, involves a waterway construction permit and § 401 certification. Because

the Authority does *not* seek an increase in its water appropriation authorization In this proceeding, the Quantity of water to be taken from the Potomac in the future is simply irrelevant.

* * * *

However, the offshore intake essentially adds a "Y" to the existing intake, mixing chamber and conduit on the shore. Accordingly, the mixing chamber and conduit establish a "bottleneck" and physically limit increases in the maximum intake capacity beyond that of the existing intake.

Third, as demonstrated above, there is no factual basis for the allegation that the Authority, by constructing an offshore intake, would be in a position to take more than its fair share of water from the Potomac. Water allocation in times of shortage is governed by the terms of the 1978 Low Flow Allocation Agreement, regardless of the maximum intake capacity any of the water suppliers might otherwise have. Moreover, as stated by the ICPRB, the needs of water consumers in the Washington Metropolitan Area are secure through the year 2020, and the 1982 co-OP Agreement provides the mechanism for meeting their needs thereafter based on cost-sharing agreements already in place between the WSSC, the Authority and the District of Columbia.[5]

---

[5] MDE appears to concede (and indeed claims vigorously) that it has the right to regulate the amount of water withdrawn from the River by any party though the water appropriation permitting process. What MDE purports to fear is a "camel's nose under the tent" or a foot-in-door" argument by the Authority, some time in the future, that the Authority has the right to take more water because it has two intakes. As shown above, however, the factual predicate tbr any such fear—that the offshore intake somehow increases the Authority's intake capacity—is plainly wrong. Nonetheless, in an effort to alleviate this misplaced concern, the Authority even stated in it's August 29,1997 Supplemental Submission to MDE that it would agree to accept as a permit condition a provision stating that the issuance of the waterway construction permit does not increase the Authority's water appropriation level and "give rise to no inference that the withdrawals permitted by such permit will be increased."

Supreme Court, U.S.
FILED
APR 24 2000
CLERK

(7)

Original Action No. 129

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF AMICUS CURIAE OF LOUDOUN COUNTY, VIRGINIA, OF LOUDOUN COUNTY SANITATION AUTHORITY AND PRINCE WILLIAM COUNTY SERVICE AUTHORITY IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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I. INTRODUCTION, STATEMENT OF INTEREST OF AMICI, AND SUMMARY OF THE ARGUMENT

The Fairfax County Water Authority ("FCWA") intends to construct a drinking water intake structure in the channel of the Potomac River because the present intake near the Virginia shore is subject to increased turbidity that raises treatment costs and creates a greater risk of disease for consumers of treated water. FCWA's plans to do so have set in motion a series of events that have led Maryland to assert suzerainty over the riparian rights of Virginia, its subdivisions, instrumentalities, and citizens in the waters of the Potomac River.

A. Interest of Amicus Loudoun County.

Loudoun County is vitally interested in seeing that Virginia's motion to file a bill of complaint is granted. It is permitted to appear as an amicus curiae because it is a county appearing through its authorized law officer, Rule 37(4), Rules of the United States Supreme Court, and because it has obtained the consent of the parties. Rule 37(2)(a).[1]

The current population of Loudoun County is approximately 136,845, representing an increase of 51% over the 1990 census. That population is exposed to health risks and higher water costs as long as Maryland continues to block FCWA's efforts to exercise the rights of Virginians to

---

[1] Letters of Consent from Virginia and Maryland have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity other than the amici curiae, their employees and their counsel made any monetary contribution to the preparation or submission of the brief. Counsel for Virginia was afforded the courtesy of previewing and commenting on the drafts of the brief prior to filing.

erect structures in the Potomac River that do not impede navigation. Loudoun County's planning process to meet its future obligations includes a study of plans to build its own water treatment plant and to construct an intake structure in the river. This process is being impeded by Maryland's actions announcing that it will refuse permits for years at a time and might do so forever depending upon what its studies show. A deferral of this case would be tantamount to a decision upholding Maryland's unwarranted claims to control Virginia's riparian rights without a hearing or a merits-based decision.

B. Interest of Amici Loudoun County Sanitation Authority and Prince William County Service Authority.

The Loudoun County Sanitation Authority ("Loudoun Authority") and the Prince William County Service Authority ("Prince William Authority") join with Loudoun County to brief the principle that deferring a decision on the issues raised in Virginia's motion would have the practical effect of sustaining Maryland's unwarranted claims over the Potomac River without a hearing and without a merits-based decision. Here, justice delayed is truly justice denied. The interests of the authorities, who also have obtained consent of the parties to appear as amici, are substantial.

1. Interest of the Loudoun Authority.

The Loudoun Authority is a public body politic and corporate and is also an instrumentality and political subdivision of the Commonwealth of Virginia authorized by Va. Code Ann. § 15.2-5114. The Loudoun Authority was created by action of the Board of Supervisors of Loudoun

County pursuant to that authority and was chartered by the State Corporation Commission on May 27, 1959.

The Virginia Water and Waste Authorities Act (the "Act") and the Loudoun Authority's Articles of Incorporation provide that the Loudoun Authority is authorized to acquire, construct, improve, operate and maintain a water system for supplying and distributing water in the county. Loudoun County has imposed the responsibility upon the Loudoun Authority to meet the water needs of the citizens of Loudoun County. While the Loudoun Authority currently serves Eastern Loudoun County, its service area includes all of the unincorporated areas of the County's approximately 517 square miles. The incorporated towns within the County operate water supply systems independently of the Authority.

The Loudoun Authority has contracted to purchase a substantial quantity of water from FCWA having acquired 20 million gallons per day of capacity, with the right to acquire additional capacity. In 1998, the Loudoun Authority actually purchased 1.5 billion gallons of water from the FCWA. In 1999, the Authority purchased 1.9 billion gallons of water from the FCWA.

As a consequence, residents of Loudoun County are being exposed to the health risks identified in Virginia's motion, arising from the higher turbidity of water taken at the present shoreline intake point. The Authority is also paying higher prices for water treatment to deal with that higher turbidity.

The Loudoun Authority has engaged in a planning process to determine how to meet its obligation to supply the future water needs of Loudoun County and has acquired a water treatment plant site on the banks of the Potomac River. As a riparian owner, the Loudoun Authority is studying

plans to withdraw water from the Potomac River from its own intake system upon the non-tidal part of the Potomac River bordering the County. Maryland's claims of authority to regulate Virginia's use of the river stand as a substantial impediment to the Authority's ability to discharge its responsibilities both in the present and the future.

2. Interest of the Prince William Authority.

The Prince William Authority is also a public body politic and corporate, organized pursuant to the provisions of the Act. It too is an instrumentality and political subdivision of the Commonwealth of Virginia. The Prince William Authority was created by action of the Board of Supervisors of Prince William County and was chartered by the State Corporation Commission on January 21, 1983. The Prince William Authority bears the responsibility to supply most of the water needs of Prince William County and is authorized to acquire, construct, improve, extend, operate and maintain water systems in that county.

Like the Loudoun Authority, the Prince William Authority purchases most of its treated water from FCWA, much of it derived from the FCWA Potomac intake. In 1998, the Prince William Authority purchased 4.74 billion gallons of water from the FCWA. In 1999, the amount purchased was 4.88 billion gallons. As a consequence, some residents of Prince William County are being exposed to the health risks identified in Virginia's motion and the Prince William Authority is paying higher wholesale prices for treated water.

The Prince William Authority is by far the largest wholesale purchaser of water in the FCWA system. The Prince William Authority has contracted with FCWA to purchase up to 13.65 billion gallons of water per year from

FCWA. The Prince William Authority relies on FCWA as the principal supply source for water to the Prince William Authority now and in the future. The Prince William Authority has designed its system based upon reliance on FCWA's ability to withdraw water from the Potomac intake. The Prince William Authority has expended or committed in excess of $100 million for the treatment plant capacity and transmission systems necessary to meet the needs of its customers within Prince William County. The Prince William Authority continues to design systems and expend funds incorporating FCWA to meet the current and future needs of its customers and others citizens of Prince William County.

Ultimately, the Prince William Authority will require in excess of 22 billion gallons per year of treated water from FCWA. Much of this required treated water will come from the FCWA Potomac intake. The action by Maryland to attempt to regulate Virginia's use of the Potomac River places the ability of the Prince William Authority to meet its responsibilities to current and future users of the system in serious jeopardy. As a consequence of the claimed right by Maryland to block Virginia's use of the River, the Prince William Authority will be forced to consider alternative supply sources to meet the current and future needs. The development of alternative sources is a long-term and extremely expensive solution for the Prince William Authority. The hundreds of millions of dollars required to develop an alternative supply source are unnecessary costs that were not anticipated by the Prince William Authority under its current operating scenario. The additional requirement will add a significant financial burden to the present and future customers of the Prince William Authority system and will ultimately have a detrimental impact on the economic growth of Prince William County as a whole.

C. Introduction and Summary of Argument.

By virtue of the Compact of 1785 between Virginia and Maryland, 1785 Va. Acts c. XVII, codified in part at Va. Code Ann. § 7.1-7, 1786 Md. Laws c. 1; the Black-Jenkins Award of 1877, Va. Code Ann. § 7.1-7, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483; this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Potomac River Compact of 1958, Va. Code Ann. § 28.2-1001, Md. Code Ann., Nat. Res. § 4-306 (1999 Supp.), Pub. L. No. 98-893, 76 Stat. 797 (1962); the Low Flow Allocation Agreement of 1978, Motion App F, and the Water Supply Cooperation Agreement of 1982, Motion App G, it is clear that Virginia has the right to build structures in the river that do not obstruct navigation and that Virginia has retained its riparian rights in the Potomac, including a right to withdraw and use water without the prior consent of Maryland.

Maryland requires that anyone seeking to construct a facility to withdraw water from the Potomac River obtain permits including a waterway construction permit and a water appropriation permit. Maryland conditions the issuance of such permits on a showing that the appropriation, in Maryland's view, is "necessary."

FCWA submitted state and federal permit applications on January 4, 1996. Although Maryland conceded that FCWA's proposed intake will not harm any aesthetic, boating or fishing interests, Motion App N, the Maryland waterway construction permit has been withheld pending consideration of whether the new intake is necessary. Motion App. P. Although administrative proceedings involving Maryland and FCWA have continued since 1997, no administrative officer has been willing to rule on FCWA's claim that Maryland lacks the right to condition Virginia's rights on a finding of necessity. *Id.* at 144a. Instead, the issue has become politically charged, with a

number of Maryland officials publicly stating that Maryland's permitting process should be used to regulate development in Northern Virginia.

On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or agree that permit approval is not required. On January 4, 2000, the Attorney General replied, asserting Maryland's putative power to regulate Virginia's riparian rights in the Potomac River. Motion App. S, T. Thereafter, the Maryland legislature passed the so-called Potomac River Protection Act in two forms. H.B. 395 purports to establish an indefinite moratorium on construction of new intakes in the Potomac. S.B. 729 does so for at least three years. The Governor of Maryland is expected to sign one of these bills. In either form, this legislation purports to prevent your amici from exercising their riparian right to withdraw water from the Potomac River.

The County and the Authorities submit that the existing dispute between Virginia and Maryland satisfies the traditional criteria for the exercise of original jurisdiction by this Court. The Commonwealth of Virginia now faces an ongoing challenge to its riparian rights. Border and water rights rest at the core of cases where this Court exercises its original jurisdiction, almost as a matter of course. In addition to its own sovereign rights, the Commonwealth of Virginia has clear standing as *parens patriae* to protect the public welfare and safety of its citizens.

This Court has previously exercised its original jurisdiction to construe riparian rights in the Potomac River. The problem here is that Maryland refuses to adhere to that which has been previously settled.

This suit is also appropriate because there is no other proper forum to resolve this serious dispute between sovereign states. Virginia is not a party to the administrative proceeding nor can it properly be required to undergo the indignity of intervening to litigate its claims in another state - particularly in a forum which at this stage of proceedings is not even a court but is instead an administrative agency without expertise in resolving legal claims of the dignity and delicacy involved here. Furthermore, Virginia and its subdivisions, authorities, and citizens other than FCWA are not parties to the Maryland proceeding and could acquire no rights against Maryland through that proceeding. Finally, now that Maryland has unequivocally asserted adverse rights against all of Virginia, far broader than the single permit at issue in the administrative proceeding, the necessity for an exercise of original jurisdiction is not fairly debatable.

II. VIRGINIA'S MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT IS SUPPORTED BY THE DECISIONS OF THIS COURT DETERMINING WHEN TO EXERCISE ORIGINAL JURISDICTION.

The facts and circumstances of this case when judged against the original jurisdiction jurisprudence of this Court strongly support the motion of the Commonwealth of Virginia to file a bill of complaint.

While it is true that the Court has held that its original jurisdiction should be invoked sparingly, *Utah v. United States*, 394 U.S. 89, 95 (1962), the subject matter here is the traditional and historic subject matter of original jurisdiction--boundary disputes and water rights issues. Historically, interstate boundary disputes are the paradigm subject matter for original jurisdiction. Vincent L. McKusick, Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961,

45 Me. L. Rev. 185, 198 (1993). The Court has previously considered boundary issues involving the Potomac River. *See Maryland v. West Virginia*, 217 U.S. 577 (1910). Beginning early in this century, the Court has entertained original jurisdiction cases involving water rights and enforcement of contracts between states. McKusick, 45 Me. L. Rev. at 198. These same interests are at the core of the present dispute, which involves boundary issues, water rights and the enforcement of interstate compacts. As former Maine Chief Justice McKusick noted in his survey, 45 Me. L. Rev. at 199, the Court has continued almost invariably to accept traditional boundary disputes and water rights disputes between two or more states.

The Court has the power to exercise original jurisdiction when the issue framed by the pleadings presents a justiciable case or controversy within the meaning of Article III of the Constitution, and the facts alleged and found afford an adequate basis for relief according to accepted doctrines of common law or equity. *Texas v. Florida*, 306 U.S. 398, 405 (1939). There can be no question that this is an actual case of controversy between states. Maryland denies the right of Virginia to take water from the Potomac River without Maryland's permission. Virginia asserts that it has such a right. Here, Virginia seeks to require the State of Maryland to abide by the terms of interstate compacts between the states as previously construed by this Court.

A state has standing to sue when its sovereign or quasi-sovereign interests are implicated. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). Such is the case, as the Court recognized in *Pennsylvania v. New Jersey*, 426 U.S. at 665, in water rights disputes such as *Kansas v. Colorado*, 206 U.S. 46 (1907).

As the Court observed in *Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902), a state is the proper party to represent and defend its citizens when their health and comfort is threatened through the acts of another state depriving those citizens of water rights. As in *Kansas v. Colorado*, 185 U.S. at 142, the action complained of here is state action and not the action of state officers in abuse or excess of their powers.

Not only are the constitutional and statutory requisites of the Court's original jurisdiction satisfied, but so are prudential and equitable limitations that the Court has imposed. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972). These considerations include the seriousness and dignity of the claim, and the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. As the Court noted in *Ohio v. Wyandotte Chemicals, Inc.*, 401 U.S. 493, 500 (1971), underlying the constitutional grant of original jurisdiction was the belief that no state should be compelled to resort to the tribunals of another state for redress, due to the appearance, if not reality, of parochialism and partiality. Virginia's sovereign rights in the Potomac River are denied by the State of Maryland. Virginia is not a party to the state administrative process involving FCWA, and Virginia has interests that are far broader than FCWA's permit. Forcing Virginia to either intervene in or otherwise abide by the outcome of that proceeding would be inconsistent with the seriousness of the dispute and the dignity of the parties.

CONCLUSION

This case satisfies all of the requisites that the Constitution, the jurisdictional statute and the decisions of this Court have established for the exercise of original jurisdiction in this Court. Maryland's denial of Virginia's sovereign rights recognized by interstate compact and by a prior decision of this Court is precisely the kind of case for which the Court's original jurisdiction was ordained and in which it has been consistently exercised.

Respectfully Submitted,

LOUDOUN COUNTY, VIRGINIA, THE LOUDOUN COUNTY SANITATION AUTHORITY and THE PRINCE WILLIAM COUNTY SERVICE AUTHORITY

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(5)

No. 129 Original

Supreme Court, U.S.
FILED
JUL 31 2000
CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

MARYLAND'S ANSWER, COUNTERCLAIM, AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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July 31, 2000

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ANSWER

Defendant, the State of Maryland ("Maryland"), pursuant to the Order of this Court of May 30, 2000, for its answer to the Bill of Complaint ("Complaint") filed by the Plaintiff, the Commonwealth of Virginia ("Virginia"), states:

1. Maryland denies the allegations contained in Paragraph 1 of the Complaint.

2. Maryland is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Complaint, and therefore denies the same.

3. Maryland admits that Virginia is a party to the Black-Jenkins Award of 1877, the Potomac River Compact of 1958, Article VII of the Compact of 1785, and the Potomac River Low Flow Allocation Agreement (LFAA). Maryland admits the allegations contained in the second sentence of Paragraph 3 of the Complaint. The remainder of Paragraph 3 consists of argument, to which no answer is required, or allegations as to the truth of which Maryland is without knowledge or information sufficient to form a belief, and therefore denies the same.

4. The allegations contained in Paragraph 4 of the Complaint consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in Paragraph 4.

5. Maryland admits the allegations contained in the second sentence of Paragraph 5 of the Complaint. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 5 of the Complaint, and therefore denies the same.

6. Maryland admits the allegations contained in Paragraph 6 of the Complaint.

7. Maryland admits the allegations contained in Paragraph 7 of the Complaint.

8. Maryland admits the allegations contained in the first two sentences of Paragraph 8 of the Complaint. The quotation purporting to be Article VII of the Compact of 1785 varies in several respects from the version of the Compact ratified by Maryland on November 7, 1785, 1785 MD. LAWS, Ch. 1, and the version of the Compact reflected in the Appendix A to the Complaint. Accordingly, Maryland denies the remaining allegations contained in Paragraph 8.

9. While Maryland admits that the Compact of 1785 did not explicitly address the boundary between the States, the Compact of 1785 was based on the premise that the Potomac River lay within Maryland territory. Maryland admits the remaining allegations contained in Paragraph 9 of the Complaint.

10. With respect to the allegations contained in the first sentence of Paragraph 10 of the Complaint, Maryland admits that the Maryland General Assembly in 1957 repealed the Act of the 1785 General Assembly ratifying the Compact of 1785. *See* 1957 MD. LAWS Ch. 766. Maryland further admits that the Maryland General Assembly in 1957 sought to exercise jurisdiction over fisheries in the tidal portion of the Potomac River without concurrence from Virginia. *See* 1957 MD. LAWS Ch. 770. Maryland admits the allegations contained in the second, third, fourth, and fifth sentences contained in Paragraph 10 of the Complaint. The last sentence purports to characterize Article VII, Section 1 of the Compact of 1958, which speaks for itself. To the extent Virginia's characterization varies from the terms of Article VII, Section 1, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the last sentence of Paragraph 10.

11. Maryland admits the second and third sentences of Paragraph 11 of the Complaint. Maryland further admits that, from 1958 to the present, Virginia and Maryland enjoyed a period of cooperation insofar as Virginia and its political subdivisions and citizens recognized Maryland's jurisdiction in the Potomac. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 11 of the Complaint, and therefore denies the same.

12. Maryland admits the allegations contained in the first sentence of Paragraph 12 insofar as Maryland signed the LFAA in 1978 with Virginia and the other signatories, but denies the allegation that the LFAA was entered into as a condition precedent "to the investment of large sums of money by the [Fairfax County Water] Authority and the Washington Suburban Sanitation Commission (WSSC) to build facilities to withdraw and treat water from the Potomac River." Rather, the LFAA was required as a condition precedent to the issuance of permits to the Authority and WSSC for the construction of drinking water intakes and was motivated out of concern that the demand for water from the Potomac exceeded its flow during low flow conditions. Maryland denies the allegations in the second sentence of Paragraph 12. The fifth prefatory paragraph of the LFAA, to which Virginia appears to refer in the second sentence of Paragraph 12, states simply that the parties to the LFAA "recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made herein requiring that access by any of them to such water be made subject to the provisions of this Agreement." The third and fourth sentences of Paragraph 12 purport to characterize the content of the LFAA, which speaks for itself. To the extent Virginia's characterization varies from the terms of the LFAA, it constitutes argument to which no answer is

required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the third and fourth sentences of Paragraph 12 of the Complaint. The allegations contained in the fifth sentence of Paragraph 12 are vague and unclear. Accordingly, Maryland is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fifth sentence of Paragraph 12, and therefore denies the same.

13. Maryland admits the allegations contained in the first sentence of Paragraph 13 of the Complaint. The allegations contained in the second, third, and fourth sentences of Paragraph 13 purport to characterize the Water Supply Coordination Agreement, which speaks for itself. To the extent Virginia's characterization varies from the terms of the Agreement, it constitutes argument to which no answer is required. To the extent necessary for purposes of this Answer, however, Maryland denies the allegations contained in the second, third, and fourth sentences of Paragraph 13 of the Complaint. With respect to the fifth sentence of Paragraph 13, Maryland admits that the Co-op is presently engaged in a water demand study for the year 2020, but adds that the study is limited to the Metropolitan Washington area.

14. Maryland admits the allegations contained in the first sentence contained in Paragraph 14 of the Complaint. With respect to the third sentence of Paragraph 14, Maryland admits that water stored in the reservoirs for purposes of water supply was used for the first time during the summer drought of 1999 to supplement the flow of the Potomac River and that the restrictions on water withdrawal in the LFAA were not triggered. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14 of the Complaint, and therefore denies the same.

15. Maryland admits the allegations contained in the second and fourth sentences contained in Paragraph 15 of the Complaint. Maryland further admits that, under Sections 5-504 and 5-507 of the Environment Article of the Annotated Code of Maryland, Maryland requires a waterway construction permit for certain regulated activities within the nontidal stretch of the Potomac River, although the term "improvement" does not appear in the relevant statutory provisions. Maryland admits further that, under Section 16-202 of the Environment Article, Maryland requires a tidal wetlands license for the dredging or filling of the lands beneath the tidal portion of the Potomac River. Maryland also admits that Section 5-507 of the Environment Article requires the Maryland Department of the Environment (MDE) to "weigh all respective advantages and disadvantages" and to issue or deny permits based on whether the proposed use or construction are in the "best public interest." Maryland admits that MDE has taken the position that it may deny permits for projects that are unnecessary in that either they provide no advantages or benefits or there exist practicable alternatives to the project that will provide comparable advantages with fewer disadvantages. Maryland denies the remaining allegations contained within Paragraph 15.

16. The allegations contained in Paragraph 16 of the Complaint consist of argument, to which no answer is required. Nevertheless, Maryland admits that, under Article VII of the Compact of 1785, the citizens of Virginia who own property riparian to the tidal portion of the Potomac have full property in the shores of the Potomac adjoining their lands along with the riparian privilege of making and carrying out wharves and other improvements so as not to impact navigation. Although the exercise of that privilege may extend beyond the low water mark, it is subject to regulation by Maryland. Insofar as the allegations contained in Paragraph 16 differ from this description of the rights of Virginia citizens under Article VII of the Compact of 1785, Maryland denies the same.

17. The allegations contained in Paragraph 17 consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in Paragraph 17 of the Complaint.

18. Maryland admits that the Authority supplies drinking water to approximately 1.2 million people, but is without information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18 of the Complaint, and therefore denies the same.

19. Maryland admits the allegations contained in the first sentence contained in Paragraph 19 of the Complaint. Maryland further admits that the Authority's shoreline intake periodically accumulates grass, leaves, and ice but denies that such accumulation has "clogged" the intake to the extent that water service to any of the Authority's customers has ever been interrupted. Maryland further admits that the turbidity of the water drawn into the Authority's shoreline intake increases following local rainstorms due to sediment-laden run-off from construction sites in two upstream Virginia tributaries, Sugarland Run and Broad Run. In order to treat this more turbid water to applicable finished water quality standards, the Authority must increase the amount of treatment chemicals applied and must remove the additional solids generated by the treatment process at some additional expense. Although the treatment process is marginally more expensive during these increased turbidity events, the process itself remains essentially unchanged. Moreover, these types of turbidity increases occur throughout the Potomac, including the mid-river location that the Authority proposed for its second intake. Consequently, Maryland denies that the treatment process is "more difficult" at the shoreline as compared to mid-river. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 19 of the Complaint, and therefore denies the same.

20. Maryland admits the allegations contained in the second sentence of Paragraph 20 of the Complaint and admits further that a consultant retained by the Authority recommended that the Authority move forward with its plans to construct a mid-river intake. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20 of the Complaint, and therefore denies the same.

21. Maryland denies the allegations contained in the first and fifth sentences of Paragraph 21 of the Complaint. Maryland admits the allegations contained in the second sentence, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 21 of the Complaint, and therefore denies the same.

22. Maryland admits that the Authority currently produces finished drinking water that complies with all federal and state water quality standards and, in fact, expects to be able to meet more stringent future standards with the same shoreline intake and water treatment process it currently employs. Maryland further admits that, in general, high turbidity in raw water following local rainstorms can be associated with elevated levels of waterborne pathogens, including *Cryptosporidium*. However, the presence of *Cryptosporidium* within a given source water depends on whether there are significant sources of *Cryptosporidium* in the watershed upstream that can be washed into the source water during rain events. High turbidity in source water from watersheds with comparatively minor sources of *Cryptosporidium* would not necessarily be associated with elevated levels of *Cryptosporidium*.

Maryland admits the allegations contained in the second sentence of Paragraph 22. With respect to the third sentence, Maryland admits that there is no current treatment

for cryptosporidiosis and that cryptosporidiosis poses a risk of death for immuno-compromised individuals. While the disease can cause extreme gastrointestinal illness in some healthy people, many others may only be mildly affected, and many others still may be infected with *Cryptosporidium* oocysts without suffering any of the symptoms of cryptosporidiosis. For all healthy people, however, the disease is self-limiting and runs its course in one to two weeks.

With respect to the fourth sentence, Maryland admits that an outbreak of cryptosporidiosis occurred in the City of Milwaukee, Wisconsin in April, 1993, resulting in more than 100 deaths and in excess of 400,000 gastrointestinal illnesses. The cause of the outbreak, however, has not been conclusively determined. Maryland admits that the source waters were contaminated, most likely from upstream cattle operations and sewage treatment plants, which are the most significant known sources of *Cryptosporidium*. However, the operation of the treatment plant that generated the contaminated finished water was also a potential cause of the outbreak. While the finished water met then-existing standards for turbidity, the treatment plant was not employing the optimized water treatment processes that the Authority and other water utilities now use to ensure safe drinking water. Accordingly, Maryland denies the remaining allegations contained in the fourth sentence of Paragraph 22.

Maryland denies the allegations contained in the fifth sentence of Paragraph 22. Some of the known outbreaks of cryptosporidiosis have occurred as a result of well water that became contaminated by *Cryptosporidium* because of the influence of unfiltered surface water. Furthermore, while many of the known outbreaks occurred in communities where water utilities used conventional filtration systems that met all state and federal water quality standards applicable at the time, those standards may not have been protective of the public health. For example, the

federal standards that were being met at the time of the Milwaukee outbreak in April 1993 were much less stringent than those that currently apply, and even less stringent than newly promulgated EPA standards.

With respect to the sixth sentence of Paragraph 22, Maryland admits that the Environmental Protection Agency (EPA), in its Interim Enhanced Surface Water Treatment Rule, set a Maximum Contaminant Level Goal (MCLG) of zero for *Cryptosporidium*. The MCLG, however, is a non-enforceable goal. The enforceable requirements of the rule regarding *Cryptosporidium* require the use of a treatment technique that achieves a 99% removal rate. Maryland denies the remaining allegations contained in Paragraph 22 of the Complaint.

23. Maryland admits that disinfection byproducts are generally considered to be animal carcinogens and suspected to be human carcinogens, but denies the remaining allegations contained in Paragraph 23 of the Complaint. Whether the treatment of surface water will generate disinfection byproducts depends on the source of the turbidity. Disinfection byproducts are created by the reaction of water treatment disinfectants with certain kinds of organic material only. The treatment of highly turbid raw water will not generate disinfection byproducts if the source of turbidity is inorganic materials, such as clays and silts. Whether the treatment of surface water will generate disinfection byproducts also depends on where disinfection occurs within the treatment process.

24. Maryland admits that using source water that is significantly lower in the organic precursors to disinfection byproducts can reduce the quantity of disinfection byproducts in finished drinking water. Maryland further admits that using source water that contains significantly less *Cryptosporidium* can provide an additional barrier in the treatment process against waterborne pathogens. Maryland denies the remaining allegations contained in

Paragraph 24 of the Complaint.

25. The allegations contained in the first sentence of Paragraph 25 of the Complaint purport to characterize Virginia Department of Health regulations set forth at 12 Va. Admin. Code § 5-590-820, which speaks for itself. To the extent Virginia's characterization varies from the terms of § 5-590-820, it constitutes argument to which no answer is required. To the extent necessary for purposes of this Answer, however, Maryland denies the allegations contained in the first sentence of Paragraph 25 of the Complaint. Maryland admits that Virginia Health Department regulations state that "preference" shall be given to the "best available" sources of supply and that "sources shall be selected and maintained on a basis which will assure that the water is continuously amenable to available treatment processes" and that the water "will meet the current requirements of the board" with respect to impurities. 12 Va. Admin. Code § 5-590-820 (1999). Maryland further admits that the Virginia Commissioner of Health has written a letter supporting the Authority's proposal for a mid-river intake, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the second sentence of Paragraph 25 of the Complaint, and therefore denies the same.

26. Maryland admits the second and third sentences of Paragraph 26 of the Complaint. Maryland further admits that the Authority submitted on or about January 4, 1996 a Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland. Maryland is without knowledge or information sufficient to form a belief as to whether the Authority applied for any other "necessary federal and state permits" and therefore denies the same.

27. Maryland admits the allegations contained in Paragraph 27 of the Complaint.

28. Maryland admits the allegations contained in Paragraph 28 of the Complaint with the added clarification that the water appropriation permit amendment was granted by the Water Rights Division of the MDE Water Management Administration, a division separate from the Nontidal Wetlands and Waterways Division that evaluated the proposed mid-river intake.

29. Maryland denies the allegations contained in Paragraph 29 of the Complaint.

30. Maryland admits that the Norfolk District of the U.S. Army Corps of Engineers (Corps) determined that the original proposal submitted by the Authority qualified for authorization under Abbreviated Standard Permit 92-ASP-18 for activities of "minimal environmental consequence." Abbreviated Standard Permit 92-ASP-18, however, by its own terms applies only to "work undertaken within the geographical limits of the Commonwealth of Virginia," not Maryland. Because the construction activities proposed to take place within the Potomac lie within Maryland territory, the federal authorization is ineffectual. The Corps has since suspended the authorization and informed members of the Audubon Naturalist Society that it will re-evaluate the propriety of authorizing the Authority's project under the Abbreviated Standard Permit if MDE issues a permit under Maryland state law. Consequently, Maryland denies the allegation that the Corps issued "the necessary federal permits" contained in Paragraph 30 of the Complaint.

31. Maryland denies the allegations contained in the first sentence of Paragraph 31 of the Complaint. Maryland admits that the project became publicly controversial with commenters on both sides of the Potomac urging MDE to deny the permit. While some Maryland state legislators likewise objected to the Authority's project, Maryland denies that the same legislators "pressured" or improperly influenced MDE to "withhold" the permits.

32. Maryland denies the first sentence of Paragraph 32 of the Complaint. Although General Assembly Delegate Jean Cryor wrote MDE voicing her concerns about the project, the letter cited by Virginia does not urge MDE to either withhold or deny the requested permits. With respect to the second sentence of Paragraph 32, Maryland admits that it held a public informational hearing on the Authority's application. Under applicable Maryland law, MDE must hold a public informational hearing if one is requested in response to a public notice published in a "newspaper of general circulation in the area where the proposed activity would occur." MD. CODE ANN., ENVT. ART. § 5-204(b) & (c). In the Authority's case, the public notice for the project was mistakenly published in a Prince George's County newspaper even though the activities were proposed for Montgomery County. As a Montgomery County delegate, Delegate Cryor's role in MDE's holding a public informational hearing was limited to pointing out the deficiencies in the public notice for the project and submitting one of the several requests for a public informational hearing that MDE received. Maryland admits the allegations contained in the third and fourth sentences of Paragraph 32 of the Complaint.

33. Maryland admits that a letter to the editor purporting to have been written by Mr. John C. Webb, Jr. of Gaithersburg, Maryland was published in the Fairfax Journal on October 21, 1997, and that Virginia accurately quotes from the letter. However, Maryland denies the contents of the quoted portion of the letter.

34. Maryland admits that the Water Management Administration (WMA) of MDE denied the Authority's waterway construction permit on December 10, 1997 and declined to act on the Authority's request for a Section 401 water quality certification. The WMA based its decision to deny the permit largely on the fact that the Authority had not demonstrated that the project would provide benefits sufficient to outweigh its environmental impacts,

particularly when the Authority had consistently and without interruption provided finished drinking water that met all applicable federal and state standards while using the existing shoreline intake, and when alternatives existed that would address sediment pollution at its source and obviate even the Authority's purported need for a mid-river intake. Maryland denies the allegation in the last sentence of Paragraph 34 of the Complaint on the grounds that MDE has not yet denied a waterway construction permit to the Authority. MDE is due to render a final decision in the matter on or before September 25, 2000. However, Maryland admits that, based on information currently available, the WMA's denial of a permit to the Authority was the first time that the WMA has ever denied a waterway construction permit for construction on the nontidal Potomac, although the WMA has denied permits for construction on other waters throughout Maryland, including the tidal Potomac. Maryland denies the remaining allegations contained in Paragraph 34 of the Complaint.

35. The first sentence of Paragraph 35 of the Complaint purports to characterize the content of a letter written by Maryland Governor Parris N. Glendening, which speaks for itself. To the extent Virginia's characterization varies from the terms of the letter, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the first sentence of Paragraph 35. Maryland is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 35 of the Complaint, and therefore denies the same.

36. Maryland admits that the Authority requested, and was granted, a contested case hearing to contest the WMA's denial of the permit. Maryland further admits that the contested case hearing was held by an Administrative Law Judge (ALJ) with the Maryland Office of Administrative

Hearings, but denies that there is "no final resolution in sight." In fact, under a scheduling agreement entered into by the parties, a final decision is due by September 25, 2000. The remainder of the first two sentences of Paragraph 36 consists of argument to which no answer is required but, for purposes of this Answer, Maryland denies the same. Maryland admits the allegations contained in the third and fourth sentences of Paragraph 36 of the Complaint. Maryland denies the allegations contained in the last sentence of Paragraph 36 insofar as the initial permit denial was rendered by the WMA, while it is MDE that issues the final decision on the permit.

37. Maryland admits that MDE entered into stipulations, which speak for themselves. To the extent Virginia's characterization of these stipulations varies from their terms and the parties' intent, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first and third sentences of Paragraph 37 of the Complaint. Maryland denies the allegations contained in the second sentence of Paragraph 37. With respect to the allegations contained in the fourth and fifth sentences of Paragraph 37, Maryland admits that MDE has to date not issued a waterway construction permit to the Authority. Maryland admits further that MDE contends in the contested case hearing that the Authority has failed to identify specific advantages that outweigh the environmental impacts that construction of the proposed mid-river intake would cause. Maryland also admits that MDE contends further that the Authority should take steps to address the sources of sediment pollution that impair water quality at the shoreline rather than simply building further out from the shore. Maryland denies the remaining allegations contained in the fourth and fifth sentences of Paragraph 37.

38. Maryland admits that the ALJ with the Maryland Office of Administrative Hearings ruled that MDE's permit

denial will be evaluated according to the criteria set forth in the applicable statute and that the Authority's allegations of political influence are not relevant. Maryland denies the remaining allegations contained in the first sentence of Paragraph 38 of the Complaint. Maryland admits the second and third sentences of Paragraph 38.

39. Maryland admits the allegations contained in the first sentence of Paragraph 39 of the Complaint. Maryland further admits that the MDE Final Decision Maker directed the ALJ to hear evidence on the need-related issues, such as whether water quality is better at the middle of the river, whether water at the shoreline presents a greater risk of *Cryptosporidium*, and whether taking steps to improve the enforcement of erosion and sediment controls in the Sugarland Run and Broad Run watersheds would address sedimentation at the shoreline intake. Maryland also admits that the Final Decision Maker, like the ALJ, declined to rule on the Authority's compact arguments. Maryland denies the remaining allegations contained in the second and third sentences of Paragraph 39. Maryland admits the allegations contained in the last sentence of Paragraph 39 and adds that the ALJ issued a proposed decision on May 10, 2000 recommending that MDE issue a permit to the Authority. The parties have filed exceptions, with a final decision in the case due by September 25, 2000.

40. Maryland denies the allegations contained in Paragraph 40 of the Complaint.

41. Maryland admits that, on February 3, 2000, Delegate Cryor introduced into the Maryland General Assembly House Bill 395, the provisions of which speak for themselves. To the extent Virginia's characterization of the provisions of H.B. 395 varies from their terms, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first, third, and fourth sentences of Paragraph 41 of the Complaint.

Maryland admits that, on February 4, 2000, Senate Bill 729 was introduced into the Maryland Senate. The provisions of S.B. 729 speak for themselves. To the extent Virginia's characterization of the provisions of S.B. 729 varies from their terms, it constitutes argument to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the second, fifth, and sixth sentences of Paragraph 41. Maryland denies the allegations contained in the last sentence of Paragraph 41.

Maryland adds that, since the filing of Virginia's Complaint, the Maryland General Assembly enacted amended versions of H.B. 395 and S.B. 729. Both bills would have allowed MDE to issue a permit to the Authority on similar terms while the required studies are being performed. S.B. 729, but not H.B. 395, established specific dates for completion of the required studies. Maryland Governor Parris N. Glendening signed S.B. 729 into law and vetoed H.B. 395. The Authority has already conceded in the contested case hearing process that it can meet the conditions set forth in S.B. 729. Accordingly, MDE has the ability under S.B. 729 to issue a waterway construction permit to the Authority in the administrative proceeding.

42. Maryland admits that S.B. 729 has a June 1, 2000 effective date. The remaining allegations contained in the first and second sentences of Paragraph 42 of the Complaint consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the remaining allegations contained in the first and second sentences of Paragraph 42. Maryland admits that legislation similar to S.B. 729 was passed by each of the two chambers of the Maryland General Assembly in 1999 but a final, reconciled bill had not passed both chambers when the session ended at midnight on April 12, 1999. Maryland denies the remaining allegations contained in the third sentence of Paragraph 42.

43. Maryland admits that the Authority submitted its permit application in January 1996, that the WMA denied the permit in December 1997, that the Authority requested a contested case hearing challenging the permit denial in December 1997, and that a final decision based on the record developed at the contested case hearing is due from MDE on September 25, 2000. Maryland denies the remaining allegations contained in Paragraph 43 of the Complaint.

44. Maryland admits the allegations contained in the first, second, and third sentences of Paragraph 44 of the Complaint. Maryland denies the allegations contained in the final sentence of Paragraph 44.

45. Maryland denies the allegations contained in the first and third sentences of Paragraph 45 of the Complaint. Maryland admits the allegations contained in the second and fourth sentences of Paragraph 45.

46. Maryland denies the allegations contained in the first, second, and third sentences of Paragraph 46 of the Complaint. Virginia has already recognized in the 1958 Compact that "Maryland is the owner of the Potomac River bed and waters to the low watermark of the southern shore thereof." Preamble, Potomac River Compact of 1958, codified at MD. CODE ANN., NAT. RES. ART. § 4-306. The allegations contained in the last sentence of Paragraph 46 consist of argument, to which no answer is required. However, to the extent necessary for purposes of this Answer, Maryland denies the allegations contained in the last sentence of Paragraph 46.

47. Maryland admits the allegations contained in Paragraph 47 of the Complaint.

48. Maryland denies the allegations contained in Paragraph 48 of the Complaint.

AFFIRMATIVE DEFENSES

49. Maryland incorporates each and every admission, denial, and averment made by Maryland in Paragraphs 1 through 48 as though fully set forth herein. Maryland asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

50. Virginia's claims are barred by the doctrine of estoppel.

SECOND AFFIRMATIVE DEFENSE

51. Virginia's claims are barred by the doctrine of waiver.

THIRD AFFIRMATIVE DEFENSE

52. Virginia's claims are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

53. Virginia's claims are barred by Virginia's consent.

FIFTH AFFIRMATIVE DEFENSE

54. Virginia's claims are barred by its election of remedies.

SIXTH AFFIRMATIVE DEFENSE

55. Virginia's claims are barred by Virginia's failure to exhaust all administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

56. Virginia's Complaint fails to state a claim upon which relief can be granted.

COUNTERCLAIM

Maryland asserts the following counterclaim against Virginia, even if found to be alternative to or inconsistent with Maryland's other claims or defenses in this action, stating and alleging as follows:

57. The Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2 of the Constitution of the United States, and Paragraph (a), Subsection (1), Section 1251, Title 28 of the United States Code.

58. Maryland owns and has sovereignty over the entirety of the bed and waters of the Potomac River to the low water mark on the Virginia side.

59. As the sovereign owner of the portion of the Potomac River within its territory, Maryland possesses traditional police power authority to regulate activities in the Potomac lying within Maryland and extending to the low water mark on the Virginia side, and has the obligation to exercise that authority in the public interest.

60. Maryland's police power authority over the Maryland portion of the Potomac River includes the right to regulate activities carried out by Virginia entities within the bed and waters of the Potomac lying within Maryland and extending to the low water mark on the Virginia side.

WHEREFORE, the State of Maryland prays that the Court:

1. Declare that Maryland's territorial sovereignty includes the right to regulate the activities of Virginia entities that take place in the bed and waters of the Potomac River lying within Maryland and extending to the low water mark on the Virginia side.

2. Award Maryland such costs and expenses, including reasonable attorney fees, as this Court deems just and proper.

Respectfully submitted,

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MOTION FOR APPOINTMENT OF SPECIAL MASTER

Defendant, the State of Maryland, by its Attorney General, joins Virginia in respectfully requesting the Court to appoint a suitable person as Special Master in this action and to refer this matter to him or her with authority to take evidence and to report the same to the Court with his or her findings of fact, conclusions of law, and recommendations for decree, all to be subject to approval or other disposition by the Court.

In support of this motion, Defendant calls the attention of this Court to the pleadings, an inspection of which discloses a variety of issues, the handling of which would benefit from the appointment of a Special Master.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

No. 129, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON BILL OF COMPLAINT

ANSWER TO COUNTERCLAIM AND RESPONSE TO MOTION FOR APPOINTMENT OF SPECIAL MASTER

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IN THE

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COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON BILL OF COMPLAINT

ANSWER TO COUNTERCLAIM

The Commonwealth of Virginia ("Virginia") responds to the Counterclaim, dated July 31, 2000, filed by the State of Maryland ("Maryland"), as follows:

1. In response to the allegations in the Counterclaim, Paragraph 57, Virginia admits that Article III, Section 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. § 1251(a), provide the United States Supreme Court with original and exclusive jurisdiction of controversies between two states. Virginia denies that the Supreme Court should exercise jurisdiction over Maryland's Counterclaim to the extent it exceeds the scope of Virginia's Bill of Complaint. The Bill of Complaint concerns whether Maryland can regulate Virginia's access to, and use of, the

Potomac River through its regulatory permitting scheme, which Maryland presently imposes on Virginia entities seeking to use the Potomac River, to the detriment of Virginia and her citizens. The Counterclaim, by contrast, raises abstract questions of law concerning Maryland's sovereignty generally in the Potomac River, which have no factual context and go well beyond the pending controversy between the States. To the extent that the Counterclaim raises issues that exceed the scope of Virginia's Bill of Complaint, the Counterclaim presents no justiciable case or controversy. Moreover, Maryland did not seek leave of Court to file the Counterclaim. If it had, Maryland would have been unable to demonstrate that this Court should resolve the abstract question of Maryland's claimed sovereignty over the Potomac River beyond the issues squarely presented in the Bill of the Complaint.

2. In response to the allegations in the Counterclaim, Paragraph 58, Virginia admits that the boundary between Virginia and Maryland is at the low-water mark of the Potomac River on the Virginia shore, in accordance with the Black-Jenkins Award of 1877, Act of March 3, 1879, ch. 196, 20 Stat. 481. But Virginia and its citizens have the right to use the River and to build improvements appurtenant to the shore, as recognized by Article VII of the Compact of 1785, Clause Four of the Black-Jenkins Award, the Potomac River Compact of 1958, Pub. L. No. 87-783, 76 Stat. 797 (1962), the Potomac River Low Flow Allocation Agreement, and federal common law governing access to, and use of, interstate streams.

3. The allegations in the Counterclaim, Paragraph 59, constitute legal argument to which no answer is required. However, to the extent necessary for purposes of this Answer,

Virginia denies that Maryland has authority to regulate Virginia's activities in the Potomac River that are contemplated, addressed and governed by Article VII of the Compact of 1785, Clause Four of the Black-Jenkins Award, the Potomac River Compact of 1958, the Potomac River Low Flow Allocation Agreement, and federal common law governing access to, and use of, interstate streams.

4. Virginia denies the allegations in the Counterclaim, Paragraph 60.

5. Virginia denies any remaining factual allegations in the Counterclaim that are not admitted above.

WHEREFORE the Court should dismiss the Counterclaim and award Virginia all costs, fees and expenses incurred in defending against it.

RESPONSE TO MOTION FOR APPOINTMENT OF SPECIAL MASTER

Although some or all of the issues raised in this case could be decided on cross-motions for summary judgment, such as Maryland's contention that Virginia's compact rights are inapplicable above the tidal reach of the Potomac River, Virginia does not oppose Maryland's request for the appointment of a Special Master. The Special Master should be granted authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for, and to submit such reports to the Court as the Special Master may deem appropriate.

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August 24, 2000

MOTION FILED
JAN 12 2001

(15)

No. 129 Orginal

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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January 12, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

68 pp.

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STATEMENT OF THE CASE

The Audubon Naturalist Society ("ANS") respectfully asks that this Court overrule Special Master Lancaster's finding of subject matter jurisdiction and direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction in this case. The Special Master incorrectly has inferred from this Court's decision to grant the Commonwealth leave to file a Bill of Complaint that this Court has "implicitly" found that subject matter jurisdiction exists. The Special Master has compounded that error by misinterpreting this Court's Article III jurisprudence in two other respects. First, the Special Master erroneously concluded that the Commonwealth can assert claims for declaratory relief under the Declaratory Judgment Act without having suffered any actual or imminent injury. Second, the Special Master mistakenly determined that the existence of jurisdiction over any one claim in the Complaint eliminated any need to determine whether subject matter jurisdiction exists independently for the remaining claims. Had the Special Master applied the correct standard for subject matter jurisdiction, it would be clear that the Commonwealth's claims must be dismissed because they are not ripe and the Commonwealth lacks standing to assert them.[1]

The Special Master's ruling that subject matter jurisdiction exists arose under unusual circumstances. On October 31, 2000, ANS sought leave from the Special Master to participate as an *amicus curiae* and, in doing so, set forth its

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[1] The Special Master evidently did not file his opinions concerning subject matter jurisdiction as a report recommending a course of action to this Court because he believes that the Court already has decided the jurisdictional issues. Because there is no report for ANS or the parties to object to by filing exceptions, ANS has filed this motion asking that the Court review the Special Master's finding of jurisdiction.

contentions that this Court lacks subject matter jurisdiction over the dispute.[2] ANS also noted that, regardless of whether it is allowed to participate as an *amicus curiae*, the Court has an independent duty to determine its own jurisdiction and that the Special Master should consider the threshold issue of jurisdiction before reaching the merits. In denying the motions of ANS and others to participate as *amicus curiae*, the Special Master expanded that ruling to conclude that the jurisdictional issues were not properly before him because ANS lacked standing to assert jurisdictional claims and by concluding that this Court had "implicitly rejected" challenges to the Court's jurisdiction in granting the Commonwealth of Virginia leave to file a Bill of Complaint. (*See* Special Master's Memorandum of Decision No. 1, *Virginia v. Maryland*, No. 129 (U.S. Dec. 11, 2000) ("First Decision") (App. B at 36a).)

In response to that decision, ANS sought reconsideration of the Special Master's conclusion that the issue of jurisdiction was not before him. (Motion of the Audubon Naturalist Society for Reconsideration of Dismissal for Lack of Subject Matter Jurisdiction, *Virginia v. Maryland*, No. 129 (filed Dec. 13, 2000) (App. C).) ANS reiterated that the Court has an independent obligation to consider its jurisdiction whenever and however it is appraised that jurisdictional questions exist. ANS also explained that in granting the Commonwealth leave to file a Bill of Complaint over jurisdictional objections, the Court did not appear to have decided the jurisdictional issues but to have followed what has been described as the Court's

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[2] On October 31, 2000, ANS filed a consolidated Motion of the Audubon Naturalist Society for Leave to Participate as an Amicus Curiae in Proceedings Before the Special Master and Motion of the Audubon Naturalist Society for Leave to File A Motion to Dismiss for Lack of Subject Matter Jurisdiction. ANS included a copy of the Motion of the Audubon Naturalist Society to Dismiss for a Lack of Subject Matter Jurisdiction in its submission to the Special Master. (App. A.)

"normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting) (addressing circumstance in which the defendant objected to jurisdiction in opposing leave to file the Bill of Complaint and filed a motion to dismiss on jurisdictional issues prior to the appointment of a Special Master). ANS further explained that, given the constraints on the Court's resources and the absence of a full briefing of the jurisdictional issues by the parties, it appears doubtful that this Court decided the jurisdictional issues *sub silencio*. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits.").

Upon reconsideration, the Special Master reiterated his conclusion that the jurisdictional issues "implicitly" were decided by this Court. (Special Master's Memorandum of Decision No. 2, *Virginia v. Maryland*, No. 129 (U.S. Dec. 28, 2000) ("Second Decision") (App. D at 48a).) Nevertheless, the Special Master also addressed the merits of ANS' jurisdictional contentions. In addressing those issues, the Special Master concluded that jurisdiction exists over the Commonwealth's claims for declaratory relief because the Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides jurisdiction over any dispute concerning a pure question of law, regardless of whether that dispute has caused the plaintiff any actual or imminent injury. (App. D at 47a-48a.) This was incorrect. The Special Master then compounded this error by concluding that the existence of jurisdiction over the claims for declaratory relief eliminated any need to determine whether the remaining claims would independently satisfy Article III requirements. (App. D at 46a.)

Assuming that this Court was simply following its "normal practice" of referring both jurisdictional questions and questions as to the merits to the Special Master to decide in the first instance, the Special Master's decision concerning jurisdiction significantly undermines the purpose of his appointment. This Court repeatedly has emphasized that federal courts are obligated to consider jurisdictional questions before reaching the merits. *See, e.g., Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 89-101 (1998). By not addressing the jurisdictional issues under the appropriate standards at the outset of the case, the Special Master will direct the parties into proceedings that may take years to resolve. After the significant burden of litigating the Compact of 1785 and other relevant facts that have materialized in the intervening 215 years, the proceedings before the Special Master will—in ANS' opinion—be found irrelevant by this Court because the Commonwealth's claims are not ripe and the Commonwealth lacks standing to assert them. Accordingly, ANS urges this Court to overrule the Special Master's finding as to jurisdiction and direct the Special Master to address whether the Court has subject matter jurisdiction under the proper standard.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT IT HAS NOT DECIDED ANY QUESTION OF JURISDICTION IN THIS CASE THROUGH THE GRANT OF LEAVE TO FILE A BILL OF COMPLAINT.

No one contests the fact that this Court has not explicitly ruled on subject matter jurisdiction, but the Special Master and ANS disagree as to whether a ruling on subject matter jurisdiction can be inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint, despite jurisdictional objections. By granting Virginia leave to file the Bill of Complaint over jurisdictional objections, this

Court appears to have followed its "normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. at 463 (Scalia, J., dissenting). Indeed, it would be peculiar for the Court to have used its limited resources to reach a decision on this Court's subject matter jurisdiction without a full briefing of the issue by the parties and at the preliminary stage of allowing a Bill of Complaint to be filed. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. at 527 (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."). Nevertheless, the Special Master has inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint that this Court "implicitly rejected" jurisdictional arguments that previously had been made. (App. B at 36a.) As a result, this Court's involvement is necessary to clarify whether it intended to transfer all issues in this case—both as to the merits and to any jurisdictional challenges—to the Special Master for full consideration.

II. THE SPECIAL MASTER ERRED IN CONCLUDING THAT NO ACTUAL OR IMMINENT INJURY IS REQUIRED BEFORE SEEKING DECLARATORY RELIEF.

The Special Master's Second Decision mistakenly concludes that the relief sought under the Declaratory Judgment Act, 28 U.S.C. §2201(a), is ripe merely because the pleadings demonstrate that the parties disagree on the purely legal questions concerning the meaning of the Compact. (App. D at 47a-48a.) The existence of a disagreement on a legal question, however, is not sufficient to establish Article III jurisdiction. This Court explicitly has held that "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . . '[C]oncrete

legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) (internal citations omitted); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (explaining that congressional legislation would violate Article III if it attempted to confer standing on persons who had not actually been injured); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-78 (1992) (holding that Congress cannot legislate around Article III's requirements).

In elaborating upon the case or controversy requirement, this Court has explained that "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (addressing claim for declaratory relief). Thus, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citations omitted) (addressing claim for declaratory relief).

A similar inquiry is required under the standing doctrine. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000).

While the Commonwealth has established that it has a purely legal disagreement with Maryland over the meaning of the Compact, the Commonwealth has not established that it

has been injured or faces imminent injury as a result of this dispute. Nor has the Commonwealth shown that any injury that it could be suffering is remediable by the declaratory relief that it seeks from this Court.

The heart of the jurisdictional inquiry is whether the Commonwealth has suffered any injury as a result of this abstract legal disagreement with Maryland. The Commonwealth's claim for declaratory relief alleges that, although the Potomac River below the low water mark on Virginia's side of the river lies solely within the State of Maryland, Article VII of the Compact of 1785 and related enactments provide Virginia riparian landowners the absolute right to construct projects in the Potomac River free from Maryland's exercise of its police power. While it is true that Maryland rejects the Commonwealth's claim that the Compact affords Virginia citizens the absolute right to build on the bed of the Potomac River within Maryland—free from any regulatory oversight by Maryland—the Commonwealth has not identified a single Virginian who has been denied such a right in the 215 years that the Compact has been in force. Nor can the Commonwealth show that such an injury is imminent.

The only Virginia entity that the Commonwealth has identified that may someday be affected by Maryland's construction of the Compact is the Fairfax County Water Authority (the "Authority"). The Authority has requested a waterway construction permit from Maryland's Department of the Environment ("MDE") and an appeal of that agency's decision to issue the permit is now before a Maryland state court. The State of Maryland has not made a final decision as to whether the permit should be granted, but thus far the Authority has persuaded an Administrative Law Judge and the Final Decisionmaker from MDE that the permit should issue as a matter of state law. In the event that MDE's decision to issue the permit under state law is affirmed by the Maryland courts, the Authority will receive the permit it

seeks without any need for this Court or any other court to consider the Compact issues. (*See* App. A at 13a-14a.)

In addition, the Commonwealth has made no showing that Maryland's construction of the Compact has prevented the Authority's proposed project or that declaratory relief from this Court could allow the project to go forward. The Authority's project cannot go forward because the Authority lacks the necessary dredge and fill permit from the United States Army Corps of Engineers. Consequently, the denial of a permit by Maryland does not deprive the Authority of anything to which it would otherwise be entitled. Not only does this fact demonstrate that the claim is not ripe, but the fact that declaratory relief under the Compact would not overcome the obstacle of a Corps permit demonstrates that the redressibility requirement for standing is not satisfied either. (*See* App. A at 14a-17a (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998); *Anderson v. Green*, 513 U.S. 557 (1995); *New Jersey v. New York*, 283 U.S. 336 (1931); *New York v. Illinois*, 274 U.S. 488 (1927) and *New Hanover Township v. United States Army Corps of Eng'rs*, 992 F.2d 470 (3d Cir. 1993).)

Consequently, it is not only clear that the Special Master erred in applying the wrong test in determining standing and ripeness requirements for seeking declaratory relief, it also is clear that the Commonwealth's claims for declaratory relief fail the requirement that there be an actual or imminent injury.

III. THE SPECIAL MASTER ERRED BY NOT ANALYZING THE COURT'S JURISDICTION TO DECIDE EACH CLAIM SEPARATELY.

The Second Decision also misconstrues ANS' jurisdictional challenges as limited to only some claims made by the Commonwealth, concluding that there is a justiciable case or controversy for Article III purposes so long as there is

jurisdiction to hear any one of the Commonwealth's claims. (App. D at 46a.) While it is true that the existence of subject matter jurisdiction over any one claim is sufficient to present an Article III case or controversy with respect to that claim, such a finding does not eliminate the need for the Court to consider its jurisdiction to decide the remaining claims.

Federal courts must have subject matter jurisdiction over each claim in a case before them. *See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). Even if the Special Master were to conclude that a justiciable case exists with regard to one claim, those claims that are not ripe or that the Commonwealth lacks standing to assert must be struck from the Bill of Complaint. *See, e.g., New Jersey v. New York*, 283 U.S. at 341 (rejecting a claim in a Bill of Complaint on ripeness grounds); *New York v. Illinois*, 274 U.S. at 89 (upholding Special Master's decision to strike a claim from a Bill of Complaint on ripeness grounds). Moreover, courts must address these threshold jurisdictional questions before addressing the merits. *Steel Co.*, 523 U.S. at 88-103 (holding that federal courts must address jurisdiction before addressing the merits).

Among the claims in the Complaint that should be dismissed is the Commonwealth's claim for an injunction prohibiting Maryland from requiring Virginians to obtain water appropriation permits for water withdrawn from the Potomac River. (App. A at 17a-19a.) Neither Virginia nor any other Virginian have been denied the right to appropriate water from the Potomac River by Maryland and the Authority has explicitly disclaimed any intention of seeking an increase in its water appropriation in the near future. Virginia's Attorney General Early has conceded the lack of ripeness for this claim by reportedly saying that "our case is very clear

cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*" *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (emphasis added.). Accordingly, this claim must be struck from the Complaint. *See e.g., New Jersey v. New York*, 283 U.S. at 341; *New York v. Illinois*, 274 U.S. at 89.

IV. THE COMMONWEALTH DOES NOT HAVE STANDING TO ASSERT COMPACT CLAIMS IN THIS CASE.

The Special Master's Second Decision provides extensive citations to Supreme Court cases where states have sued one another to resolve questions arising under a compact. (App. D at 48a.) The Special Master's reliance upon those cases is unclear. Presumably, the Special Master cited those cases in response to ANS' argument that the Commonwealth lacks standing. There is no question, however, that in a proper case, where one state is the real party in interest that has been injured by another state's construction of a compact, the Supreme Court has jurisdiction to decide cases arising between two or more states concerning that compact.

Unlike the compact cases cited by the Second Decision, however, there is a very real question as to whether the Commonwealth has been injured or is the real party in interest. (*See* App. A at 19a-28a.) Article VII of the Compact, which the Commonwealth asks this Court to interpret, does not vest any right in the Commonwealth but instead confers rights upon third parties—Virginia's riparian land owners. Where compacts confer rights upon third parties, those parties have standing to assert those rights independently of their states. Indeed, third parties often have done so under this very Compact. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921); *Evans v. United States*, 31 App. D.C. 544 (1908); *Ex Parte Marsh*, 57

F. 719 (E.D. Va. 1893). Moreover, third party beneficiaries to a compact are not bound by their state's construction of the compact—they can even sue to challenge their own state's construction of the compact. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911); *Green v. Biddle*, 21 U.S. 1 (1823).

The real party in interest to assert a claim under Article VII of the Compact would be one of the third party beneficiaries who believes that they have been deprived of their rights. The Commonwealth has not shown any direct injury to itself by any action taken by Maryland. If the Authority or any other Virginian believes that their rights under Article VII of the Compact have been violated, they would be the real party in interest to file suit. Indeed, the Authority has raised claims under the Compact in the litigation now pending in Maryland. Under these circumstances, this Court routinely has rejected attempts by a state to manufacture an original action by stepping into the litigating shoes of its citizens. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 n. 12 (1972); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911).

CONCLUSION

For the reasons set forth above, ANS requests that this Court clarify its prior order, overrule the Special Master's finding of jurisdiction, and direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims.

Respectfully submitted,

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January 12, 2001

APPENDIX A

No. 129 Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

Motion of the Audubon Naturalist Society
to Dismiss for a
Lack of Subject Matter Jurisdiction

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INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully incorporates by reference its statement of interests in its Motion for Leave to File A Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Supreme Court already has ruled that ANS has the authority to raise these jurisdictional issues before the Court as *amicus curiae*.[1]

STATEMENT OF THE CASE

Due to the rapid and largely unchecked development of Northern Virginia, considerable urban runoff empties into Sugarland and Broad Runs and then flows into the Potomac River. The adverse impact of this sedimentation on the Potomac River and its users is considerable; however, the Commonwealth's Complaint focuses only upon the impact to the Authority. The Authority is concerned that its shoreline intake withdraws these waters and the associated sediment and it must filter out and dispose of the wastes at great expense. Assuming that Virginia's sedimentation problem will not improve, the Authority seeks to move its intake away from the Virginia shoreline. The Authority does not, however, seek an increase in its appropriation of water.

For more than twenty years, the Commonwealth has ignored its legal obligation to control the sedimentation. Since 1977, it has been "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. . . ." 33 U.S.C. § 1251(a)(7) (1994). This Court has explained that this policy reflects Congress' belief that "'it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)).

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[1] *Virginia v. Maryland*, 120 S.Ct. 2192 (2000) ("Motion of Audubon Naturalist Society for leave to file a brief as *amicus curiae* granted.").

The Clean Water Act places the burden of preventing nonpoint source pollution, including urban runoff, on the states in the first instance. The Commonwealth is required to identify areas where nonpoint source pollution, including "construction activity related sources of pollution," are present and "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 288(b)(2)(H) (2000). Congress made grants available to the states to assist them in this endeavor, *id.* at § 1288(f), and provided technical assistance from federal agencies. *Id.* at § 288(g)-(i). In addition, "Section 1329, added to the Act in 1987, requires States to adopt nonpoint source management programs and similarly provides for grants to encourage a reduction in nonpoint source pollution." *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

States are required to establish water quality standards that are designed, *inter alia*, to protect the water body's "use and value for public water supplies," 33 U.S.C. § 313(c)(2)(A), and, where those standards are not met, states are required to set a total maximum daily load ("TMDL") for pollutants, including sediment, that would allow those standards to be achieved. 33 U.S.C. § 1313(d)(2). If EPA rejects the state's designation of an area where a TMDL is needed or the proposed TMDL for that area, EPA is required to make those determinations. 33 U.S.C. § 1313(d)(2).

Once an area is designated and a TMDL is set, the Commonwealth must then devise and implement a plan that will bring the water body into compliance with the TMDL. 33 U.S.C. § 1313(e). EPA's anti-degradation policy prevents back-sliding after the standards are met by requiring, *inter alia*, that the Commonwealth use "all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 31.12(a)(2); *see also* 33 U.S.C. § 1313(d)(4)(B).

TMDL's are highly effective in restoring water quality. "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving quality standards in waters impaired by non-point source pollution." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994); *see Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1002 (D.C. Cir. 1997) (endorsing TMDL for the Great Lakes).

Although the Commonwealth concedes that non-point source pollution into Sugarland and Broad Runs compromises the Potomac's "use and value for public water supplies," 33 U.S.C. § 313(c)(2)(A), it has not implemented the required controls. The Commonwealth's Complaint makes this concession explicit: "[t]he Authority's present intake at the Virginia shoreline is adversely affected by runoff from upstream tributaries following local rainstorms . . . . These conditions significantly interfere with the smooth operation of the water treatment plant . . . ." (Compl. at 10, ¶ 21.)

The Commonwealth's failure to comply with the Clean Water Act is a pervasive problem. Although "Virginia was to have submitted initial TMDLs to EPA by June 26, 1979, and thereafter from 'time to time,'" *Am. Canoe Ass'n v. EPA*, 54 F.Supp.2d 621, 623 (E.D. Va. 1999), the Commonwealth never has taken this obligation seriously. As one court recently discovered, "[i]n the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

After twenty years of noncompliance by the Commonwealth, environmental organizations sued EPA to set TMDLs for Virginia. *Id.* at 622. The District Court approved a consent decree that establishes a time-table for the Commonwealth to submit TMDLs and that compels EPA to

issue TMDLs if the Commonwealth misses those deadlines. *Id.* at 629. As a result of the consent decree and the Commonwealth's acknowledgment of sedimentation problems in Sugarland and Broad Run, the Commonwealth is obligated to implement a program to control the sedimentation.

Despite the existence of the consent decree, the Authority evidently questions the Commonwealth's intention of honoring its obligations under the Clean Water Act. In assessing its future water needs, the Authority's model assumes that the sedimentation levels affecting the current shoreline intake will remain constant over the next 40 years. (Draft Response to U.S. Army Corps of Engineers Regarding U.S. Fish and Wildlife Service Comments on Joint Application for Permit for Potomac Mid-River Intake at 2 (Dec. 1996) (App. F).) Consequently, the Authority proposes to spend $5.3 million on a new intake in the middle of the river to avoid the sediment contamination along the Virginia shoreline. *Id.* If the Commonwealth controlled sedimentation to even a modest degree, the Authority's report demonstrates that the intake would not be cost-justified.[2]

Because the Authority proposes building this mid-river intake on soil that is both owned by and within the territorial jurisdiction of the State of Maryland, Maryland law requires the Authority to seek a permit from the state. The permitting

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[2] The Authority's study estimates the present value of solids and handling costs for the next 40 years at $7.2 million and the cost of constructing the proposed intake at $5.3 million. (App. F. at 2.) The conclusion in the Authority's report that the project will save $1.9 million rests upon the assumption that the Authority's consumption of water from the shoreline intake will increase by a factor of three and one-third and that sediment levels will remain the same over the next 40 years. *Id.* Even a modest reduction in solids handling costs, spread out over 40 years, would eliminate the narrow margin of profitability for this project.

section of MDE denied the Authority's permit as unnecessary because the Authority already provides water that meets and exceeds all state and federal water quality standards. (Va. App. L.)

The Authority filed an administrative appeal claiming that it is entitled to the permit under Maryland law and pursuant to various interstate compacts between Virginia and Maryland. A Contested Case hearing was held before an Administrative Law Judge ("ALJ") with Maryland's Office of Administrative Hearings, whose decision in favor of the Authority has been appealed to a Final Decisionmaker for MDE. The Final Decisionmaker's opinion is expected in approximately one week. Either party may appeal that decision to an intermediate appellate court based upon the record developed before the ALJ. After exhausting State appeals, review of Compact issues may be had by the Supreme Court through *certiorari*.

ARGUMENT

The central question presented by this case is whether riparian land owners along the Virginia side of the Potomac River who attempt to exercise property rights in Maryland are subject to Maryland's police power. Although Virginia views Maryland's preliminary decision not to authorize the Authority's proposed construction of a mid-river intake on the State of Maryland's property as "a direct challenge to Virginia's sovereignty," (Br. at 21) it is hard to conceive how this could be so. The Commonwealth has no jurisdiction in the State of Maryland, the undisputed site of the proposed intake.

Moreover, the rights that the Commonwealth asserts are not its own rights, but the rights of third party riparian land owners on the Virginia side of the Potomac. The Commonwealth has not established that it has suffered or could ever suffer any direct injury as a result of the claims it makes here.

This Court should refuse to entertain the Commonwealth's suit because none of the Commonwealth's legal claims are ripe, and the Commonwealth would lack standing to bring them if they were.[3] No Virginia riparian land owner is seeking to increase its appropriation of water from the Potomac, and only the Authority has proposed a construction project in the river. The Authority needs both a permit from MDE and a federal permit from the Corps to begin

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[3] When concerns that the Court lacks jurisdiction are raised by *amici*, the Court gives them the same consideration as if raised by the parties. *See e.g., ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989) (considering *amici's* jurisdictional challenge because the Court "would be required, of course, to raise these matters on our own initiative"). In original action proceedings, where there is no record, the Court typically allows the Special Master to build whatever record is necessary to consider the jurisdictional issues in the first instance. *See Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting) (noting that Oklahoma had challenged the standing of Wyoming in its opposition to the motion to file a bill of complaint and in a motion to dismiss before the case was assigned to a Special Master, and concluding for three members of the Court when considering the Special Master's report that Wyoming lacks standing); *id.* at 796 (White, J.) (noting that the majority "would not hesitate to depart from our prior rulings" if it agreed with the dissent that Wyoming lacked standing); *New Jersey v. New York*, 283 U.S. 336, 341 (1931) (relying upon Special Master's report in finding a claim not ripe). Consequently, it cannot be inferred from the Court's silence in allowing the Bill of Complaint to be filed that the Court has decided the jurisdictional issue. *Cf. Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (*sua sponte* addressing jurisdictional issue and deciding against jurisdiction after the grant of *certiorari*, even though the jurisdictional issue was not raised by the parties); *Nixon v. Fitzgerald*, 457 U.S. 731, 741 (1982) (considering *sua sponte* a jurisdictional argument raised in an opposition to the petition for *certiorari* that was not argued again after *certiorari* was granted).

construction, and neither has made a final permitting decision. Consequently, no ripe controversy now exists and it is uncertain whether one ever will.

In the event that a legal claim does become ripe, the Commonwealth is not the proper party to assert it. The real party in interest would be the Virginia riparian land owner who has been denied a permit by Maryland. This Court repeatedly has held that a state cannot manipulate the original jurisdiction of this Court by suing on behalf of the real party in interest. If this Court were to permit the Commonwealth to bring a *parens patriae* action, it would distort the Article III distinction between suits brought by "Citizens" and suits brought by "States." It also would circumvent the abstention doctrine that prevents the Authority from bringing a collateral federal suit after initiating litigation in Maryland, and would subject ANS' Virginia members to a class representative adverse to their interests.

I. The Commonwealth's Legal Claims Are Not Ripe.

The Commonwealth is frustrated that the Authority's legal claims have not yet been resolved in the Maryland litigation and is seeking to litigate the Authority's claims collaterally before this Court. No case or controversy has arisen for Article III purposes, however, precisely because MDE has not decided whether to issue the permit. Importantly, no claim for a mid-river intake will be ripe until the Authority *also* obtains a permit from the Corps.

The Commonwealth also seeks to raise its legal claims by arguing that Virginia riparians are not obligated to seek Maryland's consent before increasing their appropriation of water from the Potomac. It would be frivolous for the Commonwealth to assert that this claims is ripe. The Commonwealth has failed to identify any Virginia riparian

landowner who is now seeking or who intends to seek additional water from the Potomac in the near future.

A. No Controversy Concerning the Authority's Proposed Intake Will Be Ripe Unless the Corps Issues Its Own Permit.

The Commonwealth apparently misunderstands the status of the Authority's dredge and fill permit before the Corps. *See* 33 U.S.C. § 1344 (requiring a Corps permit). The Commonwealth advised the Court that "[t]he United States Army Corps of Engineers gave its approval for the Authority's project more than three years ago, subject only to a successful resolution of the Maryland permit question." (Br. at 1.) In truth, the previously-issued permit was suspended by the Corps more than two years ago. (Letter from Reardon to Sultan of 1/28/98 (App. G) ("Based on this new information, I have no recourse other than to suspend your Department of the Army permit. . . .").) The Corps emphasized that "[f]ollowing this suspension, a decision will be made to either reinstate, modify, or revoke the subject permit." *Id.*

The Corps also has made it clear to ANS' counsel that the permit will not be reinstated as a matter of right if MDE ultimately issues a waterway construction permit. After ANS learned that the Corps had approved the initial permit without following applicable procedure, ANS' counsel wrote to the Corps requesting that the permit be revoked on numerous legal grounds. (Letter from Dubrowski to Zirschky of 12/22/97 (App. H).) The Corps responded by informing ANS' counsel that the issue had been mooted because the Corps already had suspended the permit. The Corps then advised ANS' counsel that "[i]f the county resolves the State's concerns and obtains required State permits, the District Engineer will fully consider the concerns expressed in your letter before making any decision to reinstate, modify,

or revoke the Department of the Army permit." (Letter from Zirschky to Dubrowski of 3/5/99 (App. I).) [4]

The fact that the Authority lacks the necessary authorization to construct the intake, regardless of any action taken or not taken by Maryland, demonstrates that this claim is not ripe. In *Anderson v. Green*, 513 U.S. 557 (1995), this Court dismissed a claim as not ripe under similar circumstances. In *Anderson*, this Court took jurisdiction to consider whether California's proposal to reduce Aid to Families with Dependent Children ("AFDC") payments to new residents violated the right to interstate travel. *Id.* at 559. For California to establish a payment differential for new residents receiving AFDC payments, Health and Human Services ("HHS") had to grant a waiver and such a waiver had been granted to California. *Id.* After the Court of Appeals had ruled in that case below, however, it vacated the HHS waiver in a separate proceeding. *Id.* Recognizing that no differential in payments would be made "[a]bsent favorable action by HHS on a renewed application for a waiver," this Court held that there is "no live dispute now, and whether one will arise in the future is conjectural." *Id.*; *see also Church of Scientology v. California*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

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[4] In addition to the statutory obligation for the Corps to make a separate permitting decision now that the permit has been suspended, 33 C.F.R. § 325.7(c), the Corp's offer of a hearing to ANS would obligate the Corps to provide a fair hearing even if the offer was made only voluntarily. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

Similarly, in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), this Court rejected a challenge to a Forest Service management plan as allowing excessive logging because it was unclear whether future permits that were required for the logging to take place ultimately would be issued. The general Forest Service management plan would have allowed the logging in question, but the plan did "not itself authorize the cutting of any trees." *Id.* at 729. Because logging would require compliance with the management plan and future site-specific permitting, this Court held that legal challenges would have to be made to the site-specific permits that would come later – "at a time when harm is more imminent and more certain." *Id.* at 734; *see also New Hanover Township v. United States Army Corps of Eng'rs*, 992 F.2d 470 (3d Cir. 1993) (rejecting a challenge to a federal permit because no permit was obtained from the state).

The same ripeness principle that animates *Anderson* and *Ohio Forestry* has been used to reject claims like the Commonwealth's in original actions as well. In *New York v. Illinois*, 274 U.S. 488 (1927), and *New Jersey v. New York*, 283 U.S. 336 (1931), the Supreme Court rejected the claims of plaintiff states that sued to protect their ability to begin waterway construction projects because those projects required the consent of third parties and that consent had not been obtained.

In *New York v. Illinois*, New York sought to enjoin Illinois from making allegedly excessive withdraws of water from Lake Michigan because New York claimed that it would need the water in the future to build dams to generate electricity on the Niagra and St. Lawrence rivers. In striking those claims from the bill of complaint as not ripe, the Court explained that New York

> does not show that there is any present use of the waters for such purposes which is being or will be disturbed, nor that there is any definite project for so using them

> which is being or will be affected. The waters are international and their use for developing power may require the assent of the Dominion of Canada and the United States. No consent of either is shown.

New York v. Illinois, 274 U.S. 488, 490 (1927).

Similarly, in *New Jersey v. New York*, New Jersey sought to prevent New York from diverting water from the Delaware River because it had future plans to construct dams to generate power. Relying upon findings by the Special Master, the Supreme Court determined that New Jersey's proposed construction "would need the consent of Congress and of the States of New York and Pennsylvania." *New Jersey v. New York*, 283 U.S. 336, 345 (1931). The Supreme Court determined that New Jersey's claim was not ripe because it had not received the consent of the necessary third parties.

The Commonwealth's claim against Maryland concerning the waterway construction permit is not ripe because future regulatory action is necessary for the project to take place. Until the Authority obtains the necessary permit to proceed with its project from the Corps, there is no ripe claim against Maryland.

B. The Commonwealth's Request for an Advisory Opinion Concerning Water Appropriation Is Not Ripe.

The Commonwealth's Complaint also seeks a declaration that Virginia's riparians are exempted from having to seek Maryland's permission to withdraw water from the Potomac River. The Commonwealth offers no evidence that any sort of controversy exists between Virginians and Maryland concerning water apportionment. To the contrary, Virginia's Attorney General recently has denied any intention of seeking more water. Describing this litigation, Attorney General

Earley is reported as saying that "[o]ur case is very clear cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*" *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (App. J) (emphasis added).[5]

In its opening brief to the Supreme Court, the Commonwealth rightly concedes that "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River . . . ." (Br. at 29). Nevertheless, the Commonwealth complains that, if invoked, Maryland's permitting process for such appropriations could be burdensome and time-consuming. The Commonwealth has not identified any water appropriation permits that are pending and it is not clear that any will be sought in the near future. Consequently, no claim regarding regulatory approval for appropriation is ripe. *See e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future"); *New Jersey v. Sargent*, 269 U.S. 328, 339 (1926) (rejecting New Jersey's challenge to the Federal Water Power Act premised upon its claimed intention to begin water power development because "the state is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project.")

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[5] Nor does the Commonwealth treat this as a serious issue. The *Fairfax Journal* reports that "[i]f Maryland agrees to issue the permit, Virginia will withdraw its case with alacrity, [Attorney General Earley] added." *Early Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (App. I) (emphasis added).

II. The Commonwealth Lacks *Parens Patriae* Standing to Pursue The Authority's Claim for a Construction Permit.

The Commonwealth has no legally protected interest concerning the Authority's claim for a waterway construction permit, but is merely lending its name to the Authority in an effort to manipulate a forum before this Court where the Authority's claims can be heard. By its express terms, the Compact provision that the Commonwealth relies upon dealing with the "privilege" of making improvements in the river was given to the "*citizens* of each state . . . in the shores of the Patowmack river *adjoining their lands*." (Va. App. 3a) (emphasis added). Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so with the very counsel the Commonwealth now relies upon. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit by MDE, it initiated litigation before a Maryland ALJ to obtain the permit. Plainly, it is the Authority and not the Commonwealth that is the real party in interest.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state should be able to become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, § 1332. Even then, jurisdiction is limited to the lower federal courts. By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a

state shall be a party," U.S. Const., Art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue. Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states) *with* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil*, 405 U.S. 251, 258 n. 12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana*, 176 U.S. at 16. The Commonwealth cannot circumvent this requirement by supplementing the Authority's claims with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated.

> And, more importantly, the critical distinction, articulated in Article III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania, 426 U.S. at 665-66.

Having initiated litigation in Maryland, the Authority would be barred from raising these same issues in a collateral federal suit under numerous abstention doctrines, including *Texas R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Younger v. Harris*, 401 U.S. 37, 43 (1971), and their progeny. The principles of comity toward state tribunals that animate these doctrines would be circumvented if they could be avoided simply by having the Commonwealth reassert the Authority's arguments through a collateral proceeding in this Court.[6]

B. The Commonwealth Is an Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing a state to sue another state on behalf of its citizens. *See e.g.*, *Maryland*, 451 U.S. at 745 n.21 (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil*, 405 U.S. at 259 n. 12; *Cook*, 304 U.S. at 392-93.

challenges to a permit denial by Maryland. This Court cannot hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

The Commonwealth's position also is antagonistic to the interests of Virginia riparians because it is responsible for the nuisance that affects their property. Equity does not allow a wrong-doer to represent its injured in shifting the responsibility for the problem to a third party, particularly when the requested relief is incomplete. The Commonwealth should honor its legal obligations and control nonpoint sources.

Applying *parens patriae* standing also would bind an enormous class to a litigating position that is hostile to the interests of many of its class members,[7] including ANS' Virginia members who are customers of the Authority (App. C) and riparians on the Potomac. (App. D.) Allowing direct actions by individuals, like the one the Authority is pursuing, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *Cf. California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

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[7] *See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 692 n.32 (1979) ("[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

The Commonwealth does not claim standing on the basis of any direct injury to itself, and its claim of *parens patriae* standing on behalf of the people of Northern Virginia is not convincing. According to the Commonwealth, "[a]lthough it is the Authority that is seeking to construct the offshore intake, the Commonwealth of Virginia has a substantial interest in the outcome of this suit that entitles it to bring this original action." (Br. at 22 n.8.) The only support the Commonwealth offers to buttress this claim are citations to equitable apportionment cases and cases that involved a common injury to the people of the state that was caused by another state. *Id.*; (Reply Br. at 4 n.3.)

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment or to protect its citizens from a common injury caused by another state, but this is not such a case. Equitable apportionment cases do nothing to advance the Commonwealth's claim of standing in this case as the Commonwealth has not sought equitable apportionment. In addition, this Court never has applied the equitable apportionment doctrine to a water body, like the Potomac, that is owned almost exclusively by one state. Moreover, the Commonwealth has assented to Maryland's jurisdiction to decide appropriation for more than 30 years, and this has become the settled course of conduct under the Compact. *See Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993) (holding that acquiescence is binding); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (compact displaces equitable apportionment).

There also are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth cannot identify a single Virginia riparian who has a pending appropriation request from Maryland, and

the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.) In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hearing Brief of Fairfax County Water Authority at 5-6 (App. K).) The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. *Id.* at 5. The Authority also claimed that the capacity of the treatment plant would prevent it from increasing its appropriation. *Id.* at 12. ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").

In any event, assuming that the Commonwealth had standing to pursue equitable apportionment—something it has not requested here—it would need separate standing to bring the Authority's claim for a construction permit. *See Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 120 S.Ct. 693, 706 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

Finally, the Commonwealth cannot establish standing on the basis of some common threat to the people of Virginia from the State of Maryland.[8] The Supreme Court has emphasized that "a plaintiff state must first demonstrate that the injury for which it seeks redress was directly caused by actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). In this case, however, the water quality impacts that the Commonwealth complains of are caused by

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[8] Even if the Commonwealth could establish standing to bring claims related to water quality, that would not establish its standing to challenge Maryland's requirement for approval before withdrawing a greater quantity of water.

Virginia itself through its failure to comply with the Clean Water Act in controlling pollution from Virginia's own shores.[9] Maryland's refusal to compromise its environment and the rights of its people by allowing the Authority's project does not make Maryland responsible for Virginia's failure to enforce the environmental laws applicable in Virginia.

Furthermore, there is no basis for the water quality threats that the Commonwealth alleges. The Commonwealth has suggested that the project is necessary to prevent outbreaks of disease associated with *Cryptosporidium* and *Giardia*, but, contrary to the Commonwealth's suggestion, there is no evidence that consumers of the Authority's water are threatened by either *Cryptosporidium* or *Giardia* and there is no evidence that moving the intake would reduce any risk that may exist. 1.2 million people consume the Authority's water every day and have done so for the four years since the construction permit was requested, yet the Commonwealth has not identified a single person to have been affected by *Cryptosporidium* or *Giardia* from drinking the Authority's water. This is not surprising.

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[9] The cases cited by the Commonwealth to justify its standing involve situations where the defendant state is alleged to have imposed a common hardship on the people of the plaintiff state through unfair taxation or by depriving the plaintiff state of its equitable allocation of water. (Reply Br. at 4 & n.3.) (citing *Colorado v. New Mexico*, 459 U.S. 176 (1982) (allocation of water); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (taxation); *United States v. Nevada*, 412 U.S. 534 (1973) (allocation of water); *Kansas v. Colorado*, 206 U.S. 46 (1907) (allocation of water)). Strangely, the Commonwealth also relies upon *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), a case where the Court rejected Pennsylvania's attempt to litigate *parens patriae* what were merely a collection of private claims. None of these cases suggest that a *parens patriae* suit can be maintained to force one state to come to another state's assistance.

The Authority operates a state-of-the-art facility that should eliminate virtually all *Cryptosporidium* and *Giardia* with a combination of filtration, chlorination and ozonation. Neither *Cryptosporidium* nor *Giardia* even have been detected in the water the Authority distributes to consumers, and the Commonwealth's brief is devoid of any evidence to the contrary. As the Commonwealth reminds us, "the Authority currently produces finished drinking water that complies with all federal and state water quality standards . . . ." (Br. at 11.) The Authority itself does not appear seriously concerned as it has not issued boil alerts or even targeted warnings to persons with compromised immune systems, which would be the appropriate response to a real threat.

Moreover, this case is unlike other *parens patriae* claims that have gone forward because there is no consensus among Virginians that the relief requested by the Commonwealth is appropriate.[10] To the extent that there is any real threat of pathogens in the Potomac, ANS' Virginia members believe that the proposed project would only magnify those risks. The water at the center of the river is more likely to contain *Cryptosporidium parvum*, the only species of *Cryptosporidum* known to harm humans, than waters along the shore. *C. parvum* is passed by mammalian waste, which is less likely to be in urban runoff from Sugarland and Broad Runs than waters from the middle of the river. More likely sources of *C. Parvum* do exist farther up the river, such as wastewater treatment discharge points and animal farms, and those waters are deflected from the shoreline intake by the waters from Sugarland and Broad Run. Consequently, by

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[10] The Commonwealth suggests that it has standing because the Authority's water is consumed in government buildings. (Reply Br. at 3). Of course, neither the Commonwealth nor any of the Authority's other customers have standing to sue Maryland to allow the Authority to modify the operation of its facility.

moving the intake to the center of the river, the Authority is more likely to withdraw water contaminated by *C. parvum*. The Commonwealth does not even suggest that there would be less *Giardia* at the center of the river.

If the Commonwealth continues to seek standing on the basis of a common threat to the people of Virginia from drinking the Authority's water, the Commonwealth would be required to seek an evidentiary hearing to demonstrate whether such a threat exists and, if so, whether it would be redressed by the proposed project. The Supreme Court has made it clear that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)). The Supreme Court also has emphasized that "[b]efore this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."[11] Unlike the purported harm alleged by the Commonwealth, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical,'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and "it must be

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[11] *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth . . . . The solution has been to saddle the party seeking relief with an unusually high standard of proof . . . .").

'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On the current record, the purported threat from *Cryptosporidium* and *Giardia* does not come close to satisfying this standard.

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that the Special Master grant its motion to dismiss this case for a lack of subject matter jurisdiction.

Respectfully submitted,

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October 31, 2000

APPENDIX B

No. 129, Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND
Defendant.

SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 1 (SUBJECT: *AMICUS CURIAE MOTIONS)*

December 11, 2000

Loudoun County, Virginia ("Londoun County") and Loudoun County Sanitation Authority ("Authority") have moved to participate as *amici curiae* supporting the position of the Commonwealth of Virginia ("Virginia"). The Audubon Naturalist Society ("ANS") has moved to participate as an *amicus curiae* supporting the position of the State of Maryland ("Maryland"). Virginia and Maryland have consented to the Authority's motion, and there has been no objection made to Loudoun County's motion. Maryland has consented to the ANS motion; Virginia has not.

The ANS has also moved for leave to file a motion to dismiss for lack of subject matter jurisdiction.

I. THE COMPLAINT

Virginia's complaint makes the contention that both its compacts wit. Maryland and an arbitration award grant it the complete and unconditional right to the full use of the Potomac River beyond the low water mark on the Virginia shore, provided that such use does not impair navigation, harm fisheries or otherwise interfere with Maryland's use. It is against the background of that contention and solely in the context of that complaint that these motions for *amicus* status must be evaluated.

Because the complaint raises legal issues that Virginia and Maryland, through competent counsel, can and undoubtedly will address adequately and completely and because both States are perfectly capable of evaluating and advancing any arguments suggested to them by the three *amicus* movants, we begin with a presumption that *amicus* motions should be granted only if the movants will provide some added value or net benefit to the resolution of this matter that the State parties would not provide.

II. LEGAL STANDARD

Rule 37 of the Rules of the Supreme Court of the United States governs the filing of *amicus curiae* briefs in the Supreme Court. In proceedings before a Special Mater, however, the Federal Rules of Civil Procedures ("FRCP") are to be taken as guides. *See* Supreme Court Rule 17.2. This distinction is apparently made because proceedings before a Special Master are more akin to a trial in a federal district court than to any proceeding before the Supreme Court itself. The FRCP themselves do not contain any standard for granting or denying motions to participate as an *amicus curiae* during the trial of a case in federal court. However, by well established case law, federal trial courts have broad discretion on the question of whether to grant or deny *amicus curiae* status to a nonparty. *See Bryant v. Better Business Bureau*, 923 F. Supp. 720, 728 (D. Md. 1996); *Waste Management of Pennsylvania, Inc., v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995); *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

Interesting, no movant has addressed the standard that a Special Master should apply in ruling on motions for *amicus curiae* status. Instead, each has focused on its own "special interests" in supporting the position of the party with which it aligned. Although there is no rule that *amici* must be totally disinterested, case law is clear that *amicus* participation is disfavored where, as here, the motives of the applicants appear to be primarily partisan. *See Liberty Lincoln Mercury, supra*, at 82 (when party seeking to appear as *amicus curiae* is perceived to be an advocate of one of the parties, *amicus* status should be denied); *Concerned Area Residents for the Environment v. Southview Farm*, 384 F. Supp. 1410, 1413 (W.D.N.Y. 1993) (partiality of *amicus* is a factor to consider); *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (*amicus* applicant did the court a disservice by coming

only as an advocate for one side). An *amicus* should be a friend of the court, not a friend of a particular party.

By clear authority, a trial court may grant *amicus* status to those who, as traditional "friends of the court," can serve to provide helpful analysis of the law, protect their own special interests in the subject matter of the suit, contribute to the court's understanding, provide needed supplementary assistant to the parties' counsel, and insure a complete presentation of the issues. *See Bryand, supra,* at 728; *Liberty Lincoln, supra,* at 82; *Gotti, supra,* at 1158. In every instance, *amicus* participation will be permitted only if it will bring added value to the proceedings. Here, no movant has demonstrated that its participation as an *amicus* would provide a net benefit to these proceedings in serving any of those listed roles.

After careful consideration of the movants' full briefs, the motions of all three movants are DENIED, without prejudice, for the reasons more explicitly set forth below. Any movant may renew its motion if new, compelling reasons develop hereafter to support its participation as an *amicus curiae*.

III. LOUDOUN COUNTY AND LOUDOUN COUNTY SANITATION AUTHORITY

Loundoun County and the Authority each make a credible assertion that they have substantial and unique interests in this litigation. However, both of them are political subdivisions of a party State, the Commonwealth of Virginia, and the Attorney General of Virginia represents their interests in this litigation. To the extent Loudoun County and the Authority have interests that diverge from those of any other subdivisions, departments, agencies, or constituencies that the Attorney General of Virginia represents, those interests involve conflicts internal to Virginia and are beyond the scope of this litigation and the reach of these proceedings. It is the Commonwealth of Virginia that is a party to these

proceedings and it and its political subdivisions must speak with one voice in this litigation.

Without doubt, Loudoun County and the Authority posses specialized information and insight that may be useful to the parties and the Special Master during the course of these proceedings. However, the best way for the movants to offer assistance is not through *amicus* participation, but through coordination and cooperation with existing counsel. Each movant-a political subdivision of Virginia-should work with the through the Attorney General of Virginia to ensure that Virginia's interest are properly and fully presented. It is Loudoun County's and the Authority's responsibility to keep the Attorney General of Virginia informed of how various aspects of this litigation may affect their interests and to assist the Attorney General in presenting those interests in those proceedings.

The Authority also suggests that, having obtained consent of the parties, it should be permitted to participate as a matter of course, citing Rule 37.3(a) of the Supreme Court Rules relating to the filing of briefs in cases before the Supreme Court for oral argument. As explained above, the short answer is that Rule 37 does not govern proceedings before the Special Master.

While participation by Loudoun County and the Authority in the limited way they have requested may not burden the process unduly, the Attorney General of Virginia represents their interests in these proceedings. Furthermore, their participation as *amici* is not necessary for their expertise and insight to benefit these proceedings. In sum, Loudoun County and the Authority have failed to demonstrate that their participation as *amici* is appropriate in the circumstances of this case, and their motions are DENIED, without prejudice.

IV. AUDUBON NATURALIST SOCIETY

A. Motion to Participate as an *Amicus Curiae*

Like the Authority, ANS argues that, based on Rule 37 of the Supreme Court Rules, the Supreme Court's grant of *amicus* status to ANS to file a brief opposing Virginia's motion for leave to file its complaint should accord it *amicus* status in the proceedings before the Special Master. A similar argument failed for the Authority and, for the same reason, it fails for ANS.

ANS further argues that, because it and its members use the portion of the river where Virginia proposes to build its intake pipe, because it and its members have significant rights in the Potomac River under the Public Trust Doctrine, and because it wants to file a motion to dismiss for lack of jurisdiction, it should be granted *amicus* status.

The first argument cuts too broad a swath. ANS and its members do not have an exclusive right to use the potentially affected portion of the river. The recreational and environmental interests of ANS members, including those who are Virginia riparian owners, are no different from the interests of many other members of the public. To grant ANS *amicus* status on that ground would open the floodgates to every other user, group of users, or riparian owner in that portion of the river.

ANS also suggests that "neither Maryland nor Virginia will have an interest in bringing to the Special Master's attention aspects of the Public Trust Doctrine and the police power that are relevant to a proper construction of the Compact." While ANS suggests that the Commonwealth may not adequately represent the interests of certain Virginia citizens who are members of the ANS, it offers no evidence that Maryland would not welcome advice and consultation from ANS or that Maryland's interests differ in any major respect from those of ANS and its members. Nothing has been advanced to suggest

that Maryland, as *parens patriae*, cannot adequately represent the interests of the ANS members who are Maryland residents and, concomitantly, the interests of those members of ANS who happen to be Virginia residents. Indeed, the substantive arguments set forth on pages 8-10 of the ANS brief can be made as easily by Maryland, if they are meritorious. There simply has been no showing that Maryland will not welcome any suggestions that ANS might make or that the interests of Maryland and ANS are divergent. ANS attempts to offer its views on the compact interpretation issues relevant to this case in its motion for *amicus* status, but it has not made any showing that counsel for the existing parties are incapable of fully and adequately presenting those arguments for consideration.

The Public Trust Doctrine argument is intriguing and very well set forth. But implicit in the assertion that members of the public may bring claims under the doctrine in their own right is the suggestion—without any evidence—that Maryland will not protect the values that ANS seeks to represent. And, again, ANS sweeps with too broad a brush by suggesting that "interested members of the public be allowed to vindicate their public trust rights independent of the states" and that "the people have standing to assert claims under the doctrine in their own right." If one organization is granted *amicus* status because of the Public Trust Doctrine, what logical basis would preclude other organizations seeking similar status?

ANS has failed to satisfy the criteria for a grant of *amicus* status and its motion is DENIED, without prejudice.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Finally, ANS has asked for leave to file a motion to dismiss for lack of subject matter jurisdiction. It is unclear whether ANS believes that, independent of *amicus* status, it somehow

has a right to file a motion to dismiss. So that there is no misunderstanding, it must be restated that ANS is neither a party nor an *amicus curiae* in this proceeding. It clearly, therefore, has no standing to seek leave to file any such motion.

For the sake of completeness, it should be noted that in its motion before the Supreme Court of the United States for leave to file an *amicus curiae* brief opposing Virginia's motion for leave to file a bill of complaint, ANS has already argued that Virginia's claim against Maryland is not ripe and that there is no evidence that a controversy exists between Virginia and Maryland. The Supreme Court implicitly rejected these arguments by granting the ANS motion to file its *amicus* brief and subsequently granting Virginia's motion for leave to file a complaint. There is no reason for me to consider them anew.

For the foregoing reasons, the ANS motion for leave to file a motion to dismiss for lack of subject matter jurisdiction is DENIED.

Dated: 12.11.00

/s/ Ralph I. Lancaster, Jr.
RALPH I. LANCASTER, JR.
Special Master

UNITED STATES SUPREME COURT
CERTIFICATE OF SERVICE

No. 129, Original

COMMONWEALTH OF VIRGINIA
Plaintiff,

v.

STATE OF MARYLAND
Defendant.

I, Steven J. Scott, Esq., Case Management Assistant and Law Clerk to Special Master Ralph I. Lancaster, Jr. in the above-captioned matter, hereby certify that I made service of Memorandum of Decision No. 1 by causing a copy of the same to be transmitted by facsimile and mailed by first class mail on December 11, 2000, addressed to counsel as follows:

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APPENDIX C

No. 129 Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

Motion of the Audubon Naturalist Society for
Reconsideration of Dismissal
for Lack of Subject Matter Jurisdiction

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December 13, 2000

The Audubon Naturalist Society ("ANS") respectfully requests that the Special Master reconsider those portions of its December 11, 2000 Order ("Order") refusing to consider the subject matter jurisdiction of the Supreme Court to decide this case.[1] The Special Master's Order refusing to consider the Court's subject matter jurisdiction rested on two grounds: that ANS lacked "standing" to challenge the Court's jurisdiction and that the Supreme Court "implicitly rejected these arguments." Order at 7. ANS files this memorandum to bring to the attention of the Special Master arguments that warrant reconsideration of those parts of the Order.

I. This Court Is Obligated To Consider Its Jurisdiction *Sua Sponte*.

As this Court is aware, subject matter jurisdiction is not something that must be raised by a litigant or by a person with "standing" in the case; indeed, the federal courts are obligated to address subject matter jurisdiction *sua sponte* even when all parties are willing to concede that jurisdiction exist. In *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), for example, the Supreme Court dismissed a case for a lack of subject matter jurisdiction by explaining:

> Although neither side raises the [subject matter jurisdiction] issue here, we are required to address the issue even if the courts below have not passed on it, see *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and even if the parties fail to raise the issue before us. The

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[1] At this time, ANS is not seeking reconsideration of the Order's denial, without prejudice, of ANS' ability to participate as an *amicus curiae*. To assist ANS in monitoring this litigation to determine whether a change in circumstances would warrant renewing an application to participate as *amicus curiae*, however, ANS respectfully requests that the Special Master continue to require that ANS' counsel be served with all filings submitted by the parties.

> federal courts are under an independent obligation to examine their own jurisdiction . . . . '[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing).

Id; see *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83, 94 (1998) ("'This [subject matter jurisdiction] question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))). Where questions to the Court's jurisdiction are raised by *amici*, the Supreme Court has addressed those issues by explaining that it "would be required, of course, to raise these matters on our own initiative." *ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989).

In seeking leave to file a motion to dismiss for a lack of subject matter jurisdiction, ANS attached a copy of a motion to dismiss that demonstrates that the claims asserted by the Commonwealth are not ripe and that the Commonwealth lacks standing to assert them. Regardless of whether ANS is given any role in the briefing of such jurisdictional issues before the Court, the fact that the issues have come to the Court's attention requires that the Court consider those issues before addressing the merits of the case. *Steel Company*, 523 U.S. at 89-101 (holding that federal courts must address jurisdictional issues before addressing the merits).

II. The Supreme Court Has Not "Implicitly Rejected" Challenges to Its Subject Matter Jurisdiction.

The Order attaches unwarranted significance to the fact that the Supreme Court allowed the Commonwealth to initiate this lawsuit by filing a Bill of Complaint after ANS had

alerted the Court to the fact that jurisdictional issues existed. By granting the Commonwealth leave to file the Bill of Complaint, however, ANS' jurisdictional arguments were not "implicitly rejected" by the Supreme Court as the Order suggests. Order at 7. Rather, the Supreme Court followed its usual course for interstate disputes by directing that all aspects of the case be addressed by a Special Master in the first instance.

As Justice Scalia has explained, in original actions the Court follows its "normal practice of permitting the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 462 (1992) (Scalia, J., dissenting). Consistent with this "normal practice," Special Masters have considered jurisdictional issues raised after leave to file a Bill of Complaint has been granted, *see e.g.*, Report of the Special Master at 10, *Wyoming v. Oklahoma*, No. 122 Orig. (filed Oct. 1, 1990), and the Supreme Court has followed the recommendations of Special Masters in rejecting jurisdiction over claims that it previously allowed to be filed. *See New Jersey v. New York*, 283 U.S. 336, 341 (1931) (relying upon Special Master's report in finding a claim not ripe). Although the Supreme Court could have addressed and explicitly decided the jurisdictional question before making any referral to the Special Master in this case, it did not do so here.

The mere grant of leave to file a Bill of Complaint is not a ruling that jurisdiction exists. As Justice Scalia explained in *Wyoming v. Oklahoma*:

> .To be sure, we might have given the standing question full-dress consideration to begin with, and, if we concluded in Oklahoma's favor, could have spared the parties lengthy proceedings before the Special Master. But the same could be said of the substantive issue . . . . Our choice not to proceed in that fashion was both in accord with ordinary practice and in my view sound. Almost all other litigants must go through at least two

> other courts before their case receives our attention. It has become our practice in original-jurisdiction cases to require preliminary proceedings before a special master, to evaluate the facts and sharpen the issues.

Id. at 463.

The Supreme Court's refusal to decide the question of jurisdiction before submitting the case to the Special Master reflects the limitations on the Court's institutional capabilities—not on the merits of the petitioner's claim to jurisdiction. As Justice Frankfurter has explained, "[t]he Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting). The Court is asked to hear far too many cases to give them a full briefing on jurisdictional grounds before allowing any particular case to be docketed.

The facts of this case demonstrate that the Court did not rule that jurisdiction exists. The Supreme Court has made it clear that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and that "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)). The Commonwealth, however, has not alleged any set of facts that would overcome the presumption against the exercise of jurisdiction by this Court. The issues simply have not been fully briefed by the parties.

ANS' *amicus curiae* brief opposing leave to file the Bill of Complaint raised standing and ripeness issues that were not addressed by the Commonwealth in either its initial or its

reply brief. Even now, for example, the Commonwealth has failed to provide any explanation for how its claims relating to water appropriation could be ripe when no Virginian is making a request to increase its water appropriation. Similarly, the Commonwealth has not shown how its claims under the Compact for Virginians to initiate construction projects in the Potomac River are ripe when the only Virginian who has sought to begin such construction—the Fairfax County Water Authority—may never obtain regulatory approval for the project from the United States Army Corps of Engineers.

Given the fact that the issues of standing and ripeness were not fully briefed before the Supreme Court (and even now have not been fully briefed), it cannot fairly be concluded that those issues were implicitly decided by the Supreme Court. To the contrary, the Supreme Court appears to have done nothing more than follow its usual course of directing the entire case, including questions as to jurisdiction and the merits, to the Special Master in the first instance.

CONCLUSION

For the foregoing reasons, ANS respectfully moves the Special Master to modify the Order to specify that the jurisdictional issues raised by ANS in its proposed motion to dismiss be briefed by the parties.

Respectfully submitted,

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APPENDIX D

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND
Defendant.

SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 2

(Subject: ANS Motion for Reconsideration of the Denial of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction)

December 28, 2000

The Audubon Naturalist Society ("ANS") has requested reconsideration of the portions of Memorandum of Decision No. 1 addressing the ANS attempt to have this matter dismissed for lack of subject matter jurisdiction. In support of its motion, ANS advances two points. First, it points out that the Special Master has an obligation to consider the jurisdiction question *sua sponte*. Second, ANS argues that the Supreme Court did not implicitly reject challenges to its subject matter jurisdiction by granting Virginia leave to file its Bill of Complaint.

I. The Merits of the Subject Matter Jurisdiction Question

Although ANS is correct in its assertion that any federal court has an obligation to address the absence of subject matter jurisdiction *sua sponte*, the essential flaw of the ANS motions for dismissal and reconsideration is that they focus only on portions of the pleadings while ignoring others. ANS must recognize that if *any* basis for subject matter jurisdiction appears from the pleadings, the Complaint will not be dismissed out of hand for lack of subject matter jurisdiction.

The Virginia Complaint is pled in the alternative. Among its allegations, and included in its prayer for relief, is the assertion that a proper interpretation of the Black-Jenkins Award of 1877, the Potomac River Compact of 1958 and Article VII of the Compact of 1785, grant Virginia the unfettered right to use the Potomac River and to construct improvements appurtenant to the Virginia shore upstream of the tidal reach of the Potomac, provided that such use does not impair navigation, harm fisheries or otherwise interfere with Maryland's use. For present purposes, it little matters that the Complaint contains alternative bases as a predicate for the relief sought.

Virginia has properly raised the legal question of whether Virginia has an absolute, congressionally-approved, contractual right to the use of the Potomac River for the

construction of improvements appurtenant to its shores upstream of the tidal reach without interference by Maryland. In its opposition to Virginia's motion for leave to file its complaint, Maryland flatly stated that the 1785 Compact was never meant to apply to the non-tidal stretches of the Potomac upstream of the District of Columbia. That issue is joined and, teed up by Virginia's motion for partial judgment, is being briefed.

In its April 21, 2000, opposition to the Virginia motion for leave to file its Complaint, ANS extensively addressed the ripeness of the dispute. With extensive citations of authority, ANS argued that Virginia's legal claims are not ripe and that it lacks standing. Both in the proposed motion to dismiss attached to the ANS motion for leave to participate as an *amicus* and in its present motion for reconsideration, ANS repeats those two claims and expands upon its argument that Virginia's "legal claims" are not ripe. First, those motions mistakenly focus upon the status of the permit dispute between Virginia and Maryland and the permit process with the federal government. (*See* ANS proposed Motion to Dismiss, pp. 1-10.) Second, ANS attempts to turn the dispute into a non-existent controversy over water appropriation.

Whatever the merits of the ANS ripeness arguments regarding permitting and water appropriation, ANS has overlooked the fact that Virginia seeks a declaratory judgment of its rights pursuant to the Compact and the Award—a purely legal question that, as the pleadings filed by both states show, presents an actual controversy between them. *See* 28 U.S.C. § 2201(a) (any court of the United States may grant a declaratory judgment in an actual controversy). Moreover, there is ample precedent that the Supreme Court of the United States has subject matter jurisdiction to resolve actual disputes between two sovereign states where the disagreement involves the interpretation or enforcement of solemn agreements between those states. *See*

Kansas v. Nebraska and Colorado, 120 S. Ct. 2764 (2000) (order denying Nebraska motion to dismiss regarding interpretation of Republican River Compact); *Kansas v. Colorado*, 514 U.S. 673 (1995) (decision on the merits in suit to enforce Arkansas River Compact); *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the Unite States, and our first and last order of business is interpreting the compact.") Indeed, the Supreme Court is the only court that can conclusively resolve issues of interpretation and enforcement of compacts between or among states. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies is the function and duty of the Supreme Court of the Nation.").

Thus, whether Virginia's interpretation of its compact rights is right or wrong, the Supreme Court, and, by extension, the Special Master, both have jurisdiction to address the contract issues raised in the Virginia Complaint.

II. The Supreme Court's Implicit Rejection of ANS' Arguments

ANS is correct that referral of a matter to a special master by the Supreme Court does not, *ipso facto*, conclusively resolve the jurisdiction question. However, under the circumstances in this case, ANS understates the significance of that referral. In its proposed motion to dismiss filed with the Special Master, ANS makes arguments that are in most respects identical to the *amicus* brief it filed with the Court in opposition to Virginia's motion for leave. In addition, Maryland raised the same concerns in its opposition to the Virginia motion for leave, and Virginia responded to those concerns. After consideration of those briefs, the Supreme Court decided to grant the Virginia motion for leave to file a

complaint. This is a step that the Supreme Court takes not automatically or as a matter of course, but only when it finds that the matter meets the criteria the Court has established for the exercise of its original jurisdiction. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases." (Quoting *Utah v. United States*, 394 U.S. 89, 95 (1968)) (citation omitted)).

The only factual development since the Supreme Court's grant of the Virginia motion is the Maryland Administrative Law Judge's grant of a permit to Virginia. A letter to the Special Master dated November 8, 2000, from counsel of record for Maryland states that if Maryland decided that the decision ordering issuance of the permit affected the justiciable nature of this matter, Maryland would file a motion raising that issue by December 8, 2000. Maryland filed no such motion. Under these circumstances, there is no need to have the parties brief the subject matter jurisdiction issue as ANS has requested in its motion for reconsideration.

The motion of the Audubon Naturalist Society for reconsideration, along with its request that the Special Master order the parties to brief the subject matter jurisdiction issue, is denied, with prejudice.

/s/ Ralph I. Lancaster, Jr.
RALPH I. LANCASTER, JR.
Special Master

UNITED STATES SUPREME COURT
CERTIFICATE OF SERVICE

COMMONWEALTH OF VIRGINIA
Plaintiff,

v.

STATE OF MARYLAND
Defendant.

I, Steven J. Scott, Esq., Case Management Assistant and Law Clerk to Special Master Ralph I. Lancaster, Jr. in the above-captioned matter, hereby certify that I made service of Memorandum of Decision No. 2 by causing a copy of the same to be transmitted by facsimile and mailed by first class mail on December 28, 2000, addressed to Counsel as follows:

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Supreme Court, U.S.
FILED
JAN 26 2001
OFFICE OF THE CLERK

(9)

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

STATE OF MARYLAND'S RESPONSE TO MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

While Maryland recognizes that it is unusual at this stage of the proceeding for an amicus to raise the justiciability arguments that the Audubon Naturalist Society asserts, Maryland agrees with Audubon that no case or controversy exists supporting this Court's jurisdiction over this case. Indeed, the absence of any need for that jurisdiction to continue is confirmed by events that have occurred subsequent to this Court's decision to exercise original jurisdiction in this case, namely, the issuance to the Fairfax County Water Authority of a waterway construction permit whose previous preliminary denial "prevented construction of an offshore intake that Virginia believes is an 'essential public health initiative.'" May 2, 2000 Reply Brief of Virginia at 1.

ARGUMENT

I. NO JUSTICIABLE CONTROVERSY EXISTS BETWEEN THE PARTIES IN LIGHT OF THE ISSUANCE OF A WATERWAY CONSTRUCTION PERMIT.

As Virginia's Complaint states, the "present controversy" (Complaint at 8) in this case is grounded in the Maryland Department of the Environment's preliminary denial of a waterway construction permit sought by the Fairfax County Water Authority. Based on that preliminary denial, and the Authority's failure to secure such a permit in a Maryland administrative proceeding that it initiated, the Complaint in this case asserts that "[t]he Commonwealth of Virginia and more than 1.2 million of its people are suffering present irreparable harm from the actions of the State of Maryland . . . ." Complaint ¶ 1. *Accord* May 2, 2000 Reply Brief at 3-4 ("Virginia is suffering injury from Maryland's actions, including the denial of Potomac River access, continued exposure of its citizens to unnecessary public health risks, risk of an interrupted water supply, substantial unnecessary water treatment costs that can never be recovered, and interference with the plans of several governmental subdivisions to use the River as a drinking water source.").

After this Court granted Virginia's motion for leave to file its Bill of Complaint, however, the decision maker in that administrative proceeding issued a Final Decision on November 6, 2000, in which he ordered that a waterway construction permit be issued. While Maryland has appealed that decision to the Circuit Court for Baltimore City, and so deferred filing with the Special Master a dispositive motion on mootness grounds, subsequent events in that proceeding demonstrate that Virginia is not suffering any "actual or threatened injury amenable to judicial remedy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982).

Virginia cannot argue that it is now being subjected to any action that "inflicts an actual, concrete injury," *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985), because on January 24, 2001, the Maryland Department of the Environment issued to the Fairfax County Water Authority the waterway construction permit that lies at the center of the "controversy" between Maryland and Virginia. That permit was issued in response to the January 16, 2001 decision of the Circuit Court for Baltimore City, which ordered the Maryland Department of the Environment to issue the disputed waterway construction permit "forthwith." In light of the issuance of this permit, Virginia can no longer claim that its citizens are suffering any present harm from the actions of the State of Maryland. This Court should thus withdraw its exercise of jurisdiction over this case, as that jurisdiction should be asserted "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made. . . ." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

Indeed, as Virginia has previously informed this Court, "[i]t was not until December 1997 that Maryland first denied any permit to any Virginia user," May 2, 2000 Reply Brief at 9, and that preliminary denial, along with the harm that it supposedly inflicted on Virginia and its citizens, has

now been reversed. This case thus raises only "abstract questions of political power, of sovereignty, of government," *Massachusetts v. Mellon*, 262 U.S. at 484-85, as the mere fact that a permit was preliminarily denied in the past is an insufficient basis for establishing a "real and immediate threat" of any future injury. *City of Los Angeles v. Lyons*, 461 U.S. 9, 111 (1983). Jurisdiction over this case is inappropriate, therefore, because the sole dispute that Virginia has used as a vehicle for filing its Bill of Complaint no longer even arguably gives rise to any injury demonstrating that Virginia "has suffered a wrong through the action of the other State, furnishing ground for judicial redress." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939).

II. AN ADEQUATE ALTERNATIVE FORUM EXISTS FOR RESOLVING THE DISPUTE UNDERLYING VIRGINIA'S COMPLAINT BECAUSE THAT DISPUTE IS NOW BEFORE THE MARYLAND COURTS.

This Court's continuing jurisdiction over this case is also no longer necessary because the Maryland trial and appellate courts "provide[] an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). Now that the permit case is pending before the Maryland courts and is no longer in an administrative forum, the case before this Court is no differently situated than others in which the Court has stated that it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). While Virginia has previously accused the Maryland judiciary of being "parochial and biased," May 2, 2000 Reply Brief at 7, the Maryland circuit court's order to issue the waterway construction permit "forthwith" refutes any possible "assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Maryland's compliance with that order by issuing the permit also refutes Virginia's prior misrepresentations that Maryland

legislative and executive officials have gerrymandered legislation in a manner that "guarantees" the permit application will remain pending "for many more years, and perhaps forever." Reply Brief at 1.

Much like Arizona was in *Arizona v. New Mexico*, 425 U.S. at 794, Virginia is directly represented in the pending Maryland proceeding because the Authority is a political subdivision created under the laws of Virginia. *See also Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (distinguishing *Arizona v. New Mexico* on the ground that "one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit."); *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992) (stating that "no pending action exists to which we could defer adjudication on this issue" and that "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented"). Indeed, Virginia is represented by the same private counsel in both cases. The mere presence of Compact claims in this case no more affects the adequacy of that alternative forum than did the existence of the constitutional claim in *Arizona v. New Mexico*, in which this Court refused to intervene and instead deferred to an ongoing State proceeding in which the same issue had been raised. *See also Louisiana v. Mississippi*, 488 U.S. 990 (1988).

In addition to underscoring the impartiality of the Maryland judiciary in addressing and resolving the dispute that underlies this litigation, the Maryland circuit court's order in the permit proceeding illustrates precisely why this Court should no longer exercise its jurisdiction "to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Neither the Maryland court nor the final decision maker relied on the Compact in ordering the issuance of a permit, but did so on State law grounds only. "The reign of

law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court" that obviates the need to resolve the federal issue. *Id.* Indeed, the Compact issues that Virginia raises are, as Virginia's complaint demonstrates, in "controversy" only because of the permit dispute now pending before the Maryland courts. Absent that dispute, Virginia is unable to identify any possible harm it will suffer as a basis for seeking judicial resolution of its Compact claims. Rather, as it has acknowledged, the Maryland permit case represents the only occasion in which a permit was ever preliminarily denied to a Virginia user. That denial has been reversed and the permit's issuance has been ordered by a Maryland court. There is simply no manifest need for this Court to continue to exercise its jurisdiction over this case.

CONCLUSION

For the reasons stated, Maryland agrees with the Audubon Naturalist Society that this case is not justiciable.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 30 2001
CLERK

(10)

No. 129, Original

IN THE

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COMMONWEALTH OF VIRGINIA,

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STATE OF MARYLAND,

Defendant.

BEFORE THE SPECIAL MASTER
THE HON. RALPH I. LANCASTER, JR.

VIRGINIA'S OPPOSITION TO THE MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION AND REQUEST FOR COSTS

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PRELIMINARY STATEMENT

Presenting its jurisdictional arguments for the *fourth* time since this case began, the Audubon Naturalist Society ("ANS"), a non-party, now requests that this Court intervene in the Special Master's handling of this case in order to "direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims." (ANS Motion at 11). Having been denied even *amicus curiae* status by the Special Master, ANS is a pure interloper. It should not be permitted to dictate the manner in which the Master conducts the proceedings that this Court has entrusted to his care.

STATEMENT OF THE CASE

A. Nature of the Controversy Between Maryland and Virginia

This case concerns the Commonwealth of Virginia's sovereign right to have access to, and use of, the Potomac River, a vital interstate river that provides the single largest source of drinking water for the Washington Metropolitan area. This controversy has arisen because the State of Maryland has recently applied its state permitting laws in a manner that interferes with Virginia's access rights in the non-tidal portion of the Potomac River.

Maryland has blocked and continues to block the efforts of the Fairfax County Water Authority (the "FCWA") to build an offshore drinking water intake that Virginia considers to be an essential public health initiative. In addition, Maryland enacted legislation in May 2000, while this case was pending, that forbids the construction by Virginia of any new water

intake structures in the non-tidal portion of the Potomac River prior to January 1, 2003. 2000 Md. Laws c. 557 (S.B. 729). The legislation was publicly announced by its sponsor as a way to control development in Virginia and to force Virginia to obtain Maryland's permission before it can withdraw any more water from the River in the future.[1]

These actions, intentionally targeted at Virginia, have interfered with and imperiled the efforts of several Northern Virginia municipalities, including the FCWA, the Loudoun County Sanitation Authority, and others, to plan for and provide a safe and adequate municipal water supply to the public. Maryland's actions also violate Virginia's rights to use the River and to build improvements appurtenant to the shoreline. Those rights are protected not only by federal common law governing access to interstate streams, but by Article VII of the Compact of 1785, Clause IV of the Black-Jenkins Award of 1877, and Article VII of the Potomac River Compact of 1958.

B. Relevant Proceedings and Developments to Date

Virginia instituted this action on February 18, 2000, by filing a motion for leave to file a Bill of Complaint against Maryland. Virginia's Bill of Complaint set forth the past and ongoing injury to the Commonwealth, its political subdivisions, and its citizens, resulting from Maryland's use of its permitting laws to deny Virginia's lawful access to the River. (Bill of Comp. ¶¶ 15-48). The injury is both economic

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1. *See* Commonwealth of Virginia, Reply Brief at 18a-19a (Declaration of Mark Kronenthal, filed May 2, 2000).

(the expenditure of millions of dollars in unnecessary solids handling costs, ¶¶ 20, 43), and non-economic (the exposure of the public to unnecessary health risks, ¶¶ 22-25, 43). The Bill of Complaint also detailed some of the politically influenced decisions by Maryland officials who have used that State's permitting laws to obstruct Virginia's access to the River. (*Id.* ¶¶ 31-35, 40-42).

The Loudoun County Sanitation Authority and other municipalities in Northern Virginia filed an *amicus curiae* brief in support of Virginia's motion. They explained that Maryland's policies and practices are presently interfering with their plans to use the River as a drinking water source. (Loudoun Br. at 3-5).

On April 21, 2000, Maryland filed its opposition to Virginia's motion for leave to file the complaint, contending, among other things, that no case or controversy existed because Maryland had not yet conclusively refused permission to the FCWA to build the offshore intake.[2] Maryland also argued that the existing Maryland state administrative process (in which the FCWA's permit application has been pending since January 1996), and subsequent state judicial appeals, provide an adequate forum for the interstate compact issues to be resolved, whether the issue concerns construction in the River,[3] or withdrawal of water from the River.[4]

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2. Maryland, *Brief in Opposition to Motion for Leave to File Bill of Complaint* at 7.

3. *Id.* at 10.

4. *Id.* at 15.

Also on April 21, 2000, ANS requested leave to file an *amicus curiae* brief in support of Maryland's position. In its accompanying brief, ANS set forth many of the same arguments raised by Maryland, and the same arguments raised in ANS' present motion: that the Commonwealth's claims are not ripe and that the Commonwealth lacks standing to enforce rights under the interstate compacts in question.[5]

Virginia filed its Reply Brief on May 2, 2000, describing additional hostile actions by Maryland in the months following Virginia's commencement of this action. (Virginia Reply Brief at 1-3). Virginia also responded to Maryland and ANS' arguments concerning justiciability, ripeness and standing. (*Id.* at 3-4).

On May 30, 2000, this Court entered an order granting ANS' motion for leave to file its *amicus curiae* brief, granting Virginia's motion for leave to file the Bill of Complaint, and allowing Maryland 60 days in which to file an answer. 120 S. Ct. 2192 (2000).

On July 31, 2000, Maryland filed an Answer, Counterclaim, and Motion for Appointment of Special Master. On August 24, 2000, Virginia filed an Answer to the Counterclaim and concurred in Maryland's request for the appointment of a Special Master.

On October 10, 2000, the Court granted the parties' request and appointed the Hon. Ralph I. Lancaster, Jr. as Special Master. 121 S. Ct. 294 (2000). The Master was

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5. Motion of ANS for Leave to File an *Amicus Curiae* Brief Opposing the Commonwealth of Virginia's Motion for Leave to File a Bill of Complaint and Amicus Brief of the Audubon Naturalist Society 10-17 (Apr. 21, 2000).

granted authority, among other things, "to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings," and "to submit such Reports as he may deem appropriate." *Id.*

On October 18, 2000, the Master conducted a telephone conference with counsel for the parties and the *amici* who had filed briefs in connection with Virginia's motion for leave to file the bill of complaint: ANS, Loudoun County, the Loudoun County Sanitation Authority, and the Prince William County Service Authority. (App. A). The parties agreed to a briefing schedule for dispositive motions and for any motions seeking *amicus curiae* status in proceedings before the Master. (*Id.*).

Maryland's counsel of record advised the Master that the Maryland Department of Environment ("MDE") planned to issue a final decision on the FCWA permit application by November 6, 2000, and stated his belief that a decision in favor of the FCWA could moot this case. Virginia disagreed. Accordingly, Special Master Lancaster directed Maryland to file a motion to dismiss this action by December 8, 2000, if Maryland believed that the case had been rendered moot. (*Id.*).

On November 6, 2000, MDE, through its appointed "Final Decision Maker," issued a Final Decision ordering the agency to issue a waterway construction permit to the FCWA. However, pursuant to Maryland's recently enacted "Potomac River Protection Act," 2000 Md. Laws c. 557 (S.B. 729), MDE imposed a permit condition on the FCWA that the offshore intake be constructed with a *permanent restriction* limiting the amount of water that could be withdrawn to the amount allowed by the FCWA's current Maryland water appropriation permit. MDE expressly declined to address the FCWA's arguments that the interstate compacts between Maryland and Virginia entitled it to build the project without a Maryland permit,

and that the restrictions of the Potomac River Protection Act violated those same interstate compacts.

On November 7, 2000, Maryland Governor Parris N. Glendening issued an official press release stating that "Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe," which he stated could "cause irreparable environmental damage by encouraging sprawl" (App. B). The Governor further stated that he had directed MDE and the Attorney General for Maryland "to aggressively pursue every option to ensure that the Potomac River is protected. . . ." (*Id.*).

On November 8, 2000, Maryland's Assistant Attorney General advised Special Master Lancaster of MDE's decision, without mentioning Governor Glendening's press release of the previous day. (App. C). The letter stated:

> While Maryland believes, as I previously stated in our October 8 [sic] conference call, that such a decision may affect the justiciable nature of our case with Virginia, we need to study the permit decision more fully before determining whether to pursue such an argument. In the event that we decide to do so, Maryland will file a cross-motion raising that issue at the same time Virginia files its summary judgment motion on December 8, 2000.

(App. C).[6]

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6. The letter erroneously referred to the decision by the "Maryland Administrative Law Judge" ("ALJ"), rather than by the Final Decision Maker for MDE. The Maryland ALJ had previously

(Cont'd)

On December 5, 2000, MDE filed an action for judicial review in the circuit court for the City of Baltimore, challenging its own final decision maker's November 6, 2000 decision to issue a permit to the FCWA.[7] MDE also filed a motion to stay its previous permit decision, pending appeal. MDE advised the FCWA that it was withholding the permit, notwithstanding the final decision, based on the mere pendency of the motion to stay that MDE had filed.

On December 8, 2000, the date for dispositive motions to be filed with the Master in this case, Virginia filed a motion for partial summary judgment, seeking a ruling that Virginia's compact rights apply above the tidal reach of the Potomac River, where the recent controversy has arisen.[8]

(Cont'd)
recommended on May 10, 2000, that MDE issue the waterway construction permit, declining to consider the interstate compact questions.

7. Maryland state law is unique in apparently allowing an executive agency of that state to seek judicial review of its own final decision. *See* Md. Code Ann., State Gov't § 10-222(a)(2) (1999). This peculiar feature has not gone unnoticed by Maryland courts. *See State Comm'n on Human Relations v. Anne Arundel County*, 664 A.2d 400, 409 (Md. Ct. Spec. App. 1995) ("Nonetheless, it struck us as incongruous that the Commission would be appealing from its own final administrative decision, § 10-222(a) of the APA notwithstanding.").

8. One of Maryland's principal arguments against recognizing Virginia's claims is that two Maryland state court decisions, to which Virginia was not a party, concluded that the Compact of 1785 was inapplicable above the tidal reach of the Potomac River, where the FCWA seeks to build the offshore intake. *See* Bill of Comp. ¶ 44 (second sentence); Answer ¶ 44 (admitted); Maryland Brief in Opp. to Virginia's Motion for Leave to File Bill of Complaint at 22.

Maryland did not file any cross-motions for summary judgment, nor any motion to dismiss for lack of subject matter jurisdiction.

On January 16, 2001, the circuit court for the City of Baltimore denied MDE's motion to stay the permit for the FCWA's offshore intake project, based on MDE's prior findings that the project would not cause any significant adverse environmental impact. The circuit court ordered MDE to issue the permit forthwith, in accordance with MDE's final decision of November 6, 2000. The circuit court imposed a briefing schedule on the FCWA and MDE, and has scheduled a hearing on MDE's appeal for April 2, 2001.[9]

On January 24, 2001, MDE issued a waterway construction permit to the FCWA for the offshore intake project, as ordered by the circuit court. However, in addition to objectionable permit conditions limiting Virginia's right to withdraw water from the River in the future without Maryland's prior approval, the permit also contained additional conditions that purport to regulate conduct *in Virginia territory*, above the low-water mark, such as where staging areas and equipment used for the construction may be located. Simultaneously with the issuance of the permit, MDE issued a press release stating that it had been forced to issue the permit only because of the order of the Baltimore City circuit court, but that MDE would continue to press its appeal and to seek to overturn the permit in Maryland state court.

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9. The Commonwealth is not a party to that proceeding.

Although the FCWA plans to begin construction of the project shortly,[10] the pending Maryland state court appeal of the MDE permit and the stated opposition to the project by Maryland's highest officials leave the future of that project legally uncertain. In addition, the permit that MDE has issued to the FCWA contains onerous conditions that violate Virginia's compact rights and that subject Virginia to Maryland's continued control over its access to the River. Furthermore the politically influenced administration of Maryland's permitting system, and the moratorium on new intake construction imposed by Maryland's "Potomac River Protection Act," continue to thwart and obstruct the planning efforts of several other Virginia municipalities.

C. ANS' Motions Before the Master

On October 31, 2000, ANS filed with the Master a Motion for Leave to Participate as an *Amicus Curiae* and Motion for Leave to File a Motion to Dismiss for Lack of Subject Matter Jurisdiction (ANS' "Motion for Leave") (App. D).[11] Motions for leave to participate as *amicus curiae* were also filed by Loudoun County and the Loudoun County Sanitation Authority.

ANS included with its Motion for Leave a 21-page brief entitled Motion to Dismiss for Lack of Subject Matter Jurisdiction.[12] Virtually the entire brief was copied *verbatim*

10. Contrary to ANS' representation at page 8 of its Motion for Review that the FCWA lacks federal authorization for the project, the U.S. Army Corps of Engineers is in the process of reinstating the FCWA's federal permit, which was previously suspended solely based on Maryland's decision to withhold the state approvals.

11. ANS did not attach a copy of that motion to its papers before this Court.

12. A copy of that motion is attached as Appendix A to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 1a-28a.

from ANS' *amicus curiae* brief previously filed with this Court on April 21, 2000.

On December 11, 2000, the Master issued Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions).[13] The Master denied all three motions for leave to participate as *amicus curiae* without prejudice.[14] The Master stated that "[a]ny movant may renew its motion if new, compelling reasons develop hereafter to support its participation as an *amicus curiae*."[15]

The Master further addressed ANS' motion for leave to file a motion to dismiss for lack of subject matter jurisdiction as follows:

> Finally, ANS has asked for leave to file a motion to dismiss for lack of subject matter jurisdiction. It is unclear whether ANS believes that, independent of *amicus* status, it somehow has a right to file a motion to dismiss. So that there is no misunderstanding, it must be restated that ***ANS is neither a party nor an amicus curiae in this proceeding. It clearly, therefore, has no standing to seek leave to file any such motion.***
>
> For the sake of completeness, it should be noted that in its motion before the Supreme Court of the United States for leave to file an *amicus*

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13. A copy of that decision is attached as Appendix B to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 29a-38a.

14. *Id.* at 32a.

15. *Id.*

> *curiae* brief opposing Virginia's motion for leave to file a bill of complaint, ANS has already argued that Virginia's claim against Maryland is not ripe and that there is no evidence that a controversy exists between Virginia and Maryland. The Supreme Court implicitly rejected these arguments by granting the ANS motion to file its *amicus* brief and subsequently granting Virginia's motion for leave to file a complaint. There is no reason for me to consider them anew.[16]

Accordingly, the Master denied ANS' motion for leave to file the motion to dismiss for lack of subject matter jurisdiction.[17]

Dissatisfied, on December 13, 2000, ANS filed a motion for reconsideration of the Master's Memorandum of Decision No. 1.[18] ANS requested that the Master modify his previous order "to specify that the jurisdictional issues raised by ANS in its proposed motion to dismiss be briefed by the parties."[19]

On December 28, 2000, the Master issued Memorandum of Decision No. 2 (Subject: ANS Motion for Reconsideration of the Denial of its Motion to Dismiss for Lack of Subject Matter Jurisdiction).[20] The Master found that,

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16. *Id.* at 35a-36a.

17. *Id.* at 36a.

18. A copy of that motion is attached as Appendix C to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 39a-44a.

19. *Id.* at 44a.

20. A copy of that decision is attached as Appendix D to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 45a-51a.

notwithstanding any obligation to consider the question of subject matter jurisdiction *sua sponte*, the pleadings filed by the States demonstrate "an actual controversy between them."[21] He further observed that ANS and Maryland had previously raised the same jurisdictional and standing arguments before this Court in opposition to Virginia's motion for leave to file the complaint, and that the Court nonetheless decided to exercise its original jurisdiction.[22] Finally, the Master pointed out:

> The only factual development since the Supreme Court's grant of the Virginia motion is the Maryland Administrative Law Judge's grant of a permit to Virginia. A letter to the Special Master dated November 8, 2000, from counsel of record for Maryland states that if Maryland decided that the decision ordering issuance of the permit affected the justiciable nature of this matter, Maryland would file a motion raising that issue by December 8, 2000. Maryland filed no such motion. Under these circumstances, there is no need to have the parties brief the subject matter jurisdiction issue as ANS has requested in its motion for reconsideration.[23]

Accordingly, the Master denied ANS' motion.[24]

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21. *Id.* at 47a.

22. *Id.* at 48a-49a.

23. *Id.* at 49a.

24. *Id.*

ANS subsequently filed with this Court the instant "motion for review," seeking to compel the Master to order the parties to brief ANS' jurisdictional arguments. ANS did not seek leave of Court before filing this motion. Nor did ANS request that the Master file either Memorandum of Decision with this Court before ANS filed its "motion for review" of his decisions.

ARGUMENT

A. While the Court has a Duty to Consider a Jurisdictional Defect, Procedural Rules Exist that Govern How the Parties Bring Such Matters to the Court's Attention. ANS is Not a Party Nor an *Amicus Curiae*, and its Motion Violates Those Rules.

ANS is certainly correct that every federal court, including this one, has an obligation to address the absence of subject matter jurisdiction *sua sponte* when such a defect appears, even if the parties fail to raise the issue themselves. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990). On a rare occasion, notwithstanding the general rule that the Court will not consider arguments raised only by an *amicus curiae*,[25] this Court has considered a challenge to standing raised only by an *amicus*. *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

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25. *See Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995); *Department of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 77 n.11 (1994); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

However, the Court's duty to examine the existence of subject matter jurisdiction does not mean that the Court must jump into action whenever any intermeddler, worried about such questions, notifies the clerk about its concerns. If this Court were to entertain ANS' motion on the theory that it is required to consider and rule upon a jurisdictional challenge whenever *a non-party* objects to jurisdiction, the Court will invite a flood of similar challenges from non-parties in other cases.

Rules exist that govern how a party can bring a subject matter jurisdiction objection to the Court's attention. Rules also exist that govern how a *non-party* can become a participant in the proceedings and thereupon bring such matters to the Court's attention.

ANS is not a party in this case. The Master also denied leave to ANS to participate as an *amicus curiae*, and ANS is not seeking to "appeal" that ruling.[26] As a non-party, ANS simply has no standing to "appeal" from the Master's ruling rejecting ANS' demand that the parties brief the jurisdictional question. Nor does ANS have standing to dictate the rules under which the Master's recommendations come to this Court for review.

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26. The decision whether to grant *amicus curiae* status rests within the sound discretion of the trial court. *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903); *National Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) (Posner, C.J); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). *See also United States v. California Co-Operative Canneries*, 279 U.S. 553, 556 (1929) (collecting cases holding that "an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit").

This Court stated long ago that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *In re Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911) (per curiam); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (describing the holding of *In Re Leaf Tobacco* as "a subject no longer open to discussion."); *Ex parte Cutting*, 94 U.S. 14, 20-22 (1877). Writing for the Court in *Karcher v. May*, 484 U.S. 72 (1987), Justice O'Connor put it this way:

> One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice. But we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.

Id. at 77 (citations omitted).

In this case, ANS did not seek to become a party by intervention, substitution, or third-party practice. ANS tried unsuccessfully to become an *amicus curiae*. Even as an *amicus* — which ANS assuredly is not — it would not be allowed to file any paper with this Court where no party has done so; to file a motion with this Court without first seeking its permission, Rule 37.3; or to "appeal" a Master's ruling. *See International Union, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("Because an *amicus* is not a 'party' to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals.") (citing *In re Leaf Tobacco Board*, 222 U.S. at 581; *Ex parte Cutting*, 94 U.S. at 20-22); *see also* Robert Stern, *et al*, *Supreme Court Practice* 627 (7th Ed. 1993) ("Since only an aggrieved party has standing to seek review of a

denial of certiorari or of an adverse decision on the merits, an *amicus curiae* may not do so.") (citing *Fri v. Sierra Club*, 414 U.S. 884 (1973)).

B. ANS Should Not Be Permitted to Interfere with the Master's Handling of the Reference.

This Court's order of October 10, 2000 delegated to the Master the "authority to fix the time and conditions for the *filing of additional pleadings* and to *direct subsequent proceedings*," directing him "to submit such Reports *as he may deem appropriate*." 121 S. Ct. 294 (emphasis added). ANS' motion for review seeks to interfere with the Master's handling of this case in two ways. First, ANS seeks immediate judicial review of the Master's first two rulings even though the Master has not deemed it necessary or "appropriate" to file either memorandum with this Court. Second, ANS asks this Court to compel the Master to direct the parties to brief a jurisdictional question that ANS perceives to be important, even though the Master determined that such additional pleadings and proceedings were unnecessary under the circumstances of this case.

We have been unable to identify any previous case in which a non-party like ANS has filed a motion requesting the Court to review a special master's ruling, much less to direct the master to conduct the proceedings in a specific fashion. Presumably, such a motion would be disfavored even if a *party* had filed it. As one treatise notes:

> The *parties* to the litigation may apply to the court for instructions to the master on how to proceed with the reference. District judges are *reluctant, however, to instruct the master on how to conduct the proceedings since this interference would*

> *defeat the very purpose of making a reference. The object, of course, is to give the master as much latitude as possible in achieving the objectives of the reference with a minimum of judicial intervention.*

9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2609 at 687 (1995) (emphasis added). That judicial reluctance should be even greater where, as here, *a non-party* takes it upon itself to object to the master's handling of the reference.

C. The Master Properly Declined to Require that the Parties Brief the Question of Subject Matter Jurisdiction.

The relief sought by ANS before the Master was to require that Virginia and Maryland "brief" the question of subject matter jurisdiction. Similarly, in its "motion for review," ANS wants this Court to "direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims." (ANS' Motion at 11).

As noted above, Maryland *had* a briefing schedule for such a motion. The Master directed Maryland to file a motion to dismiss by December 8, 2000, if it believed the case to have been rendered moot. (App. A). Maryland agreed to that schedule. (App. C).[27] On November 7, 2000, however, Maryland's governor declared a state of war on the offshore intake project, vowing to fight against it as a way of combating urban "sprawl" in Virginia. (App. B).

---

27. Indeed, Maryland previously represented to this Court that a decision in favor of the FCWA in that administrative case would render it unnecessary for the Court to exercise its original jurisdiction. State of Maryland, *Brief in Opposition to Motion for Leave to File Bill of Complaint* at 10-11.

As part of that concerted opposition, MDE filed suit on December 5, 2000 in Maryland state court to overrule its own final decision to permit the project to go forward. It is understandable, therefore, that Maryland's Attorney General could not have filed, in good faith, any motion with the Master on December 8, 2000 questioning the existence of an actual controversy between the States. *See also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) ("Voluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' And the 'heavy burden of persuad[ing]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.") (citations omitted).[28]

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28. MDE's grudging issuance of the FCWA permit does not moot any of the Compact issues in this case. First, MDE refused to consider the FCWA's argument that the interstate compacts in question allow it to construct the project without obtaining a Maryland permit. That issue will not be litigated in the circuit court for the City of Baltimore. Second, the permit that MDE issued to the FCWA contains numerous, objectionable conditions that seek permanently to limit Virginia's ability to withdraw water from the River and that purport to regulate conduct in Virginia territory. Third, MDE continues to appeal the permit decision in Maryland state court, seeking to overturn it and to force the FCWA to remove the offshore intake even after it is installed. Fourth, existing Maryland law bans any new intakes from Virginia at least until January 1,2003, directly interfering with the plans of other Virginia municipalities, including the Loudoun County Sanitation Authority. And finally, nothing in the FCWA permit decision addresses Virginia's claim that the interstate compacts at issue simply prevent Maryland in the first place from subjecting the FCWA or any other Virginia municipality to Maryland's lengthy and hostile permitting process. That point would not be rendered moot, even if Maryland were to issue a permit to the FCWA without reservation. Thus, Maryland cannot show that it has ceased its objectionable conduct towards Virginia, much less carry the "heavy burden" of proving that the challenged conduct cannot reasonably be expected to resume in the future. *Adarand Constructors*, 528 U.S. at 222.

Under these circumstances, and having concluded from his own review of the pleadings that there is, in fact, an actual case or controversy,[29] the Master did not err in declining to order the parties to brief the question. The fact that ANS is dissatisfied with this result and prefers more briefing is simply not grounds to interfere with the Master's handling of the reference.

D. The Master Correctly Inferred that this Court Rejected ANS' Jurisdictional Challenges When It Granted Virginia's Motion for Leave to File the Complaint.

ANS does the Master a disservice by suggesting that he blithely concluded that subject matter jurisdiction existed here simply because the Court granted Virginia's motion for leave to file the complaint and referred the case to him. Rather, the Master explained as follows:

> ANS is correct that referral of a matter to a special master does not, *ipso facto*, conclusively resolve the jurisdiction question. However, *under the circumstances of this case,* ANS understates the significance of that referral. In its proposed motion to dismiss filed with the Special Master, ANS makes arguments that are in most respects *identical* to the *amicus* brief it filed with the Court in opposition to Virginia's motion for leave. In addition, Maryland raised *the same concerns* in its opposition to the Virginia motion for leave, and Virginia responded to those concerns. After consideration of those briefs, the Supreme Court decided to grant the Virginia motion for leave to

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29. Memorandum of Decision No. 2, ANS Motion for Review, App. D at 47a.

> file a complaint. This is a step that the Supreme Court takes not automatically or as a matter of course, but only when it finds that the matter meets the criteria the Court has established for the exercise of its original jurisdiction.[30]

It is insulting to suggest that this Court, when it granted Virginia's motion for leave, somehow failed to think about the jurisdictional challenges that Maryland and ANS both identified as a *principal* reason the Court should decline jurisdiction.

ANS cites the dissenting opinion in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), for the proposition that it is the Court's "normal practice" when it takes an original action case to refer all questions, including standing, to a special master. *Id.* at 463. However, the *majority* pointed out that Oklahoma raised the question of standing in opposition to Wyoming's motion for leave to file the complaint, and that the Court implicitly rejected that claim when it decided to take the case:

> Over Oklahoma's objection, which is repeated here, the Special Master also concluded that this case was an appropriate one for the exercise of our original jurisdiction. We agree, and *we obviously shared this thought when granting Wyoming leave to file its complaint in the first instance*. We have generally observed that the Court's original jurisdiction should be exercised "sparingly," *Maryland v. Louisiana*, 451 U.S., at 739; *United States v. Nevada*, 412 U.S. 534, 538

30. *Id.* at 48a-49a (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)).

> (1973), and this Court applies discretion when accepting original cases, even as to actions between States where our jurisdiction is exclusive.

Id. at 450 (emphasis added). Just as in *Wyoming v. Oklahoma*, the jurisdictional issues in this case were briefed by the parties and the *amici* before this Court granted Virginia's motion for leave to file the complaint. The Master reasonably concluded that the Court evaluated those issues when it decided to exercise its original jurisdiction.

The Master's finding of jurisdiction from his own reading of the pleadings, his reasonable inference from the Court's acceptance of jurisdiction, and his offer to Maryland to brief the question if it disagreed, amply supported his decision to reject ANS' demand that he nonetheless direct the parties to brief the issue once again.

E. The Court Should Impose Costs on ANS.

Although represented by a well-respected law firm, ANS cannot cite any authority or rule of court allowing it — as a non-party — to file a "motion for review" of the Special Master's rulings. This frivolous motion has imposed unnecessary costs and expenses on Virginia in having to respond to it. Accordingly, Virginia respectfully requests that the Court direct the Master to determine the amount of reasonable costs and attorneys' fees to be imposed on ANS.

While there appears to be no direct precedent for doing this, that is likely because a non-party has never before attempted to do what ANS has done here. However, in *Nebraska v. Wyoming*, 504 U.S. 982 (1992), the Court approved the Master's decision to impose a portion of the

costs on the *amici*, where the Master had found, and the *amici* conceded, that the proceedings were "expanded and made more costly by reason" of their participation. *Id.* at 982.

ANS certainly cannot dispute that its actions here have imposed the same type of burden and cost on the parties. The Court should send a strong message that non-parties simply may not file motions with this Court whenever they disapprove of how the Court or one of its appointed masters is conducting a case.

CONCLUSION

ANS' motion for review of the Special Master's Memorandum of Decision Nos. 1 and 2 should be denied, and the Court should direct the Master to determine appropriate costs and attorneys' fees to be assessed against ANS for filing this motion.

Respectfully submitted,

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(804) 786-3870

* *Counsel of Record*

Counsel for Plaintiff

APPENDIX

APPENDIX A — LETTER OF THE SPECIAL MASTER DATED 10/19/2000 AND CASE MANAGEMENT ORDER NO. 1

RALPH I. LANCASTER
Pierce Atwood
One Monument Square
Portlane, Maine 04101-1110

SPECIAL MASTER
Virginia v. Maryland,
Supreme Court of the
United States
No. 129, Original

Telephone: 207-791-1100
Facsimile: 207-791-1350

E-mail:
rlancaster@pierceatwood.com

October 19, 2000

VIA FACSIMILE and U.S. MAIL

The Honorable Frederick S. Fisher
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

The Honorable Andrew H. Baida
Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202

Appendix A

E. Duncan Getchell, Jr., Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

Christopher D. Man, Esq.
Arnold & Porter
555 12th Street N.W.
Washington, D.C. 20004

Re: *Virginia v. Maryland,* Supreme Court of the United States, No. 129, Original

Dear Counsel:

Thank you for your courtesies during yesterday's telephone conference.

I had originally planned to arrange for a meeting of counsel in December in Washington in order to establish discovery rules and a schedule for getting the matter to trial and resolution as expeditiously as possible. However, in view of the importance of the underlying legal issues which may be dispositive of this matter, I am persuaded that we should proceed as we agreed yesterday.

To that end, I enclose Case Management Order No. 1 which encompasses the schedule you suggested. I assure you that I will address the issues raised by any dispositive motions as soon as briefing is completed and will rule as promptly as possible.

Appendix A

Please notify me as soon as possible of the ruling by the Maryland Administrative Law Judge on November 6. If the parties agree that that moots this matter, I can so report to the Supreme Court. If the parties do not so agree, we will adhere to the schedule contained in the enclosed order.

I suggest that the stakes for both sides in this proceeding are very high. I again urge the parties to put politics to one side and think seriously about a negotiated resolution.

Rest assured that if the matter is not resolve by the parties I will do everything I can to move the matter to a rapid resolution.

As the matter proceeds, please feel free to call on me or Steve Scott if we can be of any help in resolving uncertainties.

Sincerely,

/s/

Ralph I. Lancaster, Jr.

RIL/wjo
Enclosure

Appendix A

No. 129, Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

CASE MANAGEMENT ORDER NO. 1

RALPH I. LANCASTER, JR
Special Master
One Monument Square
Portland, Maine 04101
(207) 791-1199

October 19, 2000

Appendix A

CASE MANAGEMENT ORDER NO. 1

For purposes of further proceedings in this case it is hereby ORDERED that:

1. Any dispositive motions and briefs in support thereof shall be filed on or before December 8, 2000

2. Responses to said motions and briefs in support thereof shall be filed on or before February 7, 2001.

3. Reply briefs to the briefs filed as aforesaid shall be filed on or before February 28, 2001.

4. Motions seeking amicus status shall be filed on or before November 1, 2000.

5. Responses and briefs in support thereof shall be filed on or before November 10, 2000.

6. Reply briefs addressed to the amicus applications shall be filed on or before November 17, 2000.

7. All pleadings, papers and other documents may be filed with the Special Master on 8 ½ x 11 inch paper. The parties and applicants for amicus status shall make filings with the Special Master and service upon the other parties or any amicus by facsimile or by some means of overnight delivery with duplicate copies of any materials transmitted by facsimile also sent by first class mail. All pleadings, papers and documents submitted to the Special Master shall be served on counsel for all state parties and any amicus in time

for receipt on the same day that the Special Master receives them. Distribution must be made only to counsel of record on the distribution list attached hereto as Appendix A. All pleadings, papers and documents submitted to the Special Master must indicate, in the certificate of service or elsewhere, the means by which service or transmittal has been accomplished.

/s/
Ralph I. Lancaster, Jr.
Special Master

APPENDIX B — GOVERNOR PARRIS N. GLENDENING, PRESS RELEASE DATED 11/7/2000

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE

CONTACT: Michelle Byrnie
Raquel Guillory
Governor's Press Office
410-974-2316

GOVERNOR'S PRESS OFFICE

GOVERNOR GLENDENING RESPONDS TO DECISION ON WATER INTAKE PIPE

ANNAPOLIS, MD (November 7, 2000) — Governor Parris N. Glendening released the following statement regarding the recommendation that Maryland's Department of Environment issue a permit to Fairfax County to extend its water intake pipe in the Potomac River.

"Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe which could seriously threaten the public's health and the health of the Potomac River. I have requested the Department of the Environment and the Attorney General to aggressively pursue every option to ensure the Potomac River is protected and Maryland's high standards of stewardship are maintained.

Appendix B

"We have serious concerns that extension of the intake pipe would cause irreparable environmental damage by encouraging sprawl and seriously compromise water quality for thousands of residents in both Virginia and Maryland.

"Maryland is successfully balancing growth and economic development with strong environmental policies. We have the highest household income in the nation, the lowest overall poverty rate and lowest child poverty rate in the country, and record low employment.

"Under a 1632 land grant by King Charles I of England, Maryland owns the entire Potomac River. I firmly believe that Maryland's historic stewardship of the Potomac River is in the best interest of the both [sic] states, the environment and future generations."

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APPENDIX C — LETTER FROM MARYLAND'S COUNSEL OF RECORD TO THE SPECIAL MASTER DATED 11/8/2000

(On letterhead of the State of Maryland Office of the Attorney General)

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

Telecopier No.
(410) 576-6955

Writer's Direct Dial. No.
(410) 576-6318

November 8, 2000

VIA FACSIMILE

The Honorable Ralph I. Lancaster, Jr.
Pierce Atwood
One Monument Square
Portland, Maine 04101-1110

Re: *Virginia v. Maryland*, Supreme Court, No. 129, Original

Dear Special Master Lancaster:

I am writing to notify you that the Maryland Administrative Law Judge has issued a final decision ordering the issuance of a waterway construction permit to the Fairfax County Water Authority. While Maryland believes, as I previously stated in our October 8 conference call, that such a decision may affect the justiciable nature of

our case with Virginia, we need to study the permit decision more fully before determining whether to pursue such an argument. In the event that we decide to do so, Maryland will file a cross-motion raising that issue at the same time Virginia files its summary judgment motion on December 8, 2000.

Thank you for your consideration.

Sincerely,

/s/
ANDREW H. BAIDA
Assistant Attorney General

cc: Frederick S. Fisher, Assistant Attorney General (via facsimile)
Christopher D. Man, Esq. (via facsimile)
E. Duncan Getchell, Esq. (via facsimile)
Stuart A. Raphael, Esq. (via facsimile)

APPENDIX D — EXCERPTS — ANS' MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND FOR LEAVE TO FILE A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

No. 129 Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Motion of the Audubon Naturalist Society for Leave to Participate as an Amicus Curiae in Proceedings Before the Special Master and Motion of the Audubon Naturalist Society for Leave to File a Motion to Dismiss for Lack of Subject Matter Jurisdiction

---

Appendix D

KATHLEEN A. BEHAN
CHRISTOPHER D. MAN*
ARNOLD & PORTER
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(202) 942-5000

Counsel for Audubon Naturalist Society

* Counsel of Record

October 31, 2000

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Appendix D

INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully moves the Special Master to grant it leave to participate as an *amicus curiae* in proceedings before him.[1] ANS also respectfully moves for leave to file the attached motion to dismiss this case for a lack of subject matter jurisdiction. With regard to ANS' request to participate in proceedings before the Special Master, ANS asks it be allowed to brief issues raised by the parties and, if appropriate, be allowed further rights of participation upon the filing of a motion establishing good cause.

. . .

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The State of Maryland has consented to ANS participating as an *amicus curiae* in proceedings before the Special Master, (Letter from Baida to Man of 10/23/00 (App. A)), but the Commonwealth of Virginia has refused to give its consent. (Letter from Fisher to Man of 10/23/00 (App. B).)

Appendix D

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that the Special Master grant its motion to participate as an *amicus curiae*, grant its motion for leave to file a motion to dismiss for a lack of subject matter jurisdiction and dismiss this case for a lack of subject matter jurisdiction.

Respectfully submitted,

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No. 129 Orginal

Supreme Court, U.S.
FILED
FEB 14 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

REPLY BRIEF OF THE AUDUBON NATURALIST SOCIETY SEEKING REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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February 14, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

SOP

There Is No Procedural Obstacle That Prevents This Court From Considering Its Own Jurisdiction

The Commonwealth of Virginia has not attempted to demonstrate why it has standing to assert the claims raised in its Bill of Complaint or to explain why those claims are ripe, but instead asks that this Court ignore these jurisdictional questions for procedural reasons. While the Commonwealth's interest in shielding the jurisdictional questions from scrutiny is understandable, there is no procedural obstacle that prevents this Court from doing so.

Subject matter jurisdiction is not a question that must be raised by the parties. This Court has explained that it is "required to address" its subject matter jurisdiction, "even if the parties fail to raise the issue." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). In the past, the Court has considered jurisdictional challenges raised by non-parties, explaining that "it would be required, of course, to raise these matters on our own initiative." *ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989). The Court never has recognized any procedural rule that restricts its ability to consider its jurisdiction, but instead has considered its jurisdiction once it appears that an issue as to jurisdiction exists. Here, of course, the jurisdictional issue now has been raised by the State of Maryland, as well as by the Audubon Naturalist Society ("ANS"). (*See* Md. Br. at 1 ("Maryland agrees with Audubon that no case or controversy exists supporting this Court's jurisdiction over this case.")

In original actions, where no record has been developed by a trial court, the Court typically decides jurisdictional issues after they have been referred to a Special Master. While this Court, at times, has addressed jurisdictional questions in deciding whether to grant or deny leave to file a Bill of Complaint, its "normal practice" has been to appoint a Special Master to examine the jurisdictional issues and the

merits of a case in the first instance. *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting).

In the opinion of the Audubon Naturalist Society ("ANS") and the State of Maryland, it is necessary for the Court to now consider the jurisdictional question for itself. This Court granted ANS' motion to participate as an *amicus curiae* to challenge this Court's subject matter jurisdiction at the same time that it granted the Commonwealth's motion for leave to file a Bill of Complaint. *Virginia v. Maryland*, 120 S.Ct 2192 (2000). The Court appeared to have followed its "normal practice" of referring the questions as to jurisdiction and the merits of the dispute to Special Master Lancaster on October 10, 2000. *Virginia v. Maryland*, 121 S.Ct. 294 (2000). It appears that the Special Master misunderstood this Court's order granting leave to file a Bill of Complaint as having "implicitly" decided that jurisdiction exists, rather than as simply referring all of the questions in the case for the Special Master to decide in the first instance. Special Master's Memorandum of Decision No. 1, *Virginia v. Maryland*, No. 129 (U.S. Dec. 11, 2000).

As demonstrated in the briefs of both ANS and the State of Maryland, the time for this Court to review the question of subject matter jurisdiction is now. Ordinarily, the resolution of such a dispositive issue by the Special Master is made through a recommendation to the Court through a Report, but in this instance the Special Master chose to issue an order, apparently assuming that the issue already had been resolved by the Court. Had the Special Master filed his decision on jurisdiction as a Report, both the parties and prospective *amici* would have had the right to suggest exceptions to the Special Master's Report. *See, e.g.*, S.Ct. Rule 33(1)(g)(x) (noting that *amici* can file exceptions to a Special Master's Report). The Court, therefore, should treat the Special Master's Order as a Report and decide whether his decision regarding jurisdiction was appropriate. While the Court

would be well within its power to conclude for itself that no jurisdiction exists, it also could provide guidance to the Special Master for how these jurisdictional questions should be considered and remand the issues to him.

This request for the Court to follow its ordinary practice of insisting that its Special Master, like lower federal courts, consider jurisdictional issues before involving the parties in lengthy proceedings concerning the merits is entirely reasonable. Nevertheless, without ever having answered ANS' objections to its lack of standing and the lack of ripeness of its claims, the Commonwealth asserts that it is somehow "frivolous" for ANS to advise the Court that the Special Master essentially foreclosed any jurisdictional challenge without informing the Court. (Va. Br. at 21.)[1] The Commonwealth's decision to seek costs against a public interest organization for aiding the Court in identifying jurisdictional issues that Maryland also has raised and that Virginia simply would rather not address is inappropriate.

ANS has involved itself in this litigation because it believes that the legal arguments advanced by the Commonwealth are wrong as a matter of law and would lead to disastrous results for the environment, its members and others who enjoy the Potomac River. The Court and the law benefit from the effort of third parties, like ANS, that attempt to help the Court reach the correct decisions on the merits of the legal issues that come before it. Likewise, the Court and

---

[1] The Commonwealth's suggestion that *Nebraska v. Wyoming*, 504 U.S. 982 (1992), somehow supports its claims for sanctions is without merit. (Va. Br. at 21-22.) That decision merely upheld a decision by a Special Master to allocate a portion of *his* costs to an *amicus curiae* (with the consent of the *amicus curiae*), as well as the parties, because the *amicus* was allowed to participate in hearings in a similar manner to the parties. We are not aware of any instance where this Court has ordered an *amicus curiae* or third party to pay the legal expenses of a party.

the law benefit when third parties help the Court to recognize that there is no reason to reach the merits of any decision when it lacks jurisdiction in a case, as ANS has shown to be the case here.

CONCLUSION

For the reasons set forth above, ANS requests that this Court clarify its prior order, overrule the Special Master's finding of jurisdiction, direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims and reject the Commonwealth's motion for costs.

Respectfully submitted,

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February 14, 2001

MOTION FILED
MAR 16 2001

(16)

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION FOR LEAVE TO FILE AN AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM, AND AMENDMENT TO ANSWER AND COUNTERCLAIM

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AMENDMENT TO ANSWER AND COUNTERCLAIM

MOTION FOR LEAVE TO FILE AN AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION FOR LEAVE TO FILE AN AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

Defendant, the State of Maryland, pursuant to Rule 17 of the United States Supreme Court, moves for leave to amend its July 31, 2000 Answer and Counterclaim to Plaintiff Commonwealth of Virginia's Bill of Complaint by adding the affirmative defense that Virginia's claims are barred by the doctrine of prescription and acquiescence. Although this Court has stated that "proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings," *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995), Maryland's proposed amendment raises nothing new in this litigation.

First, Maryland's April 21, 2000 Brief in Opposition to Virginia's Motion for Leave to File a Bill of Complaint cited this doctrine in arguing that "[i]t is too late now [for Virginia] to challenge Maryland's right to regulate the non-tidal portion of the Potomac." Br. at 23.

Second, in its Answer and Counterclaim to Virginia's Bill of Complaint, Maryland asserted the affirmative defenses of estoppel, waiver, and laches, rather than the doctrine of prescription and acquiescence, because the latter typically applies only when a State seeks to establish title, ownership, and jurisdiction over property that is in dispute, *see, e.g., New Jersey v. New York*, 523 U.S. 767, 786-87 (1998), and this Court has previously recognized that the 1632 charter from Charles I to Lord Baltimore "in unmistakable terms included the Potomac River." *Morris v. United States*, 174 U.S. 196, 223 (1899). Because Virginia does not contest ownership in this case, estoppel and waiver, rather than prescription and acquiescence, are the legal theories that control Virginia's centuries-old practice of conforming to Maryland's regulatory authority over the Potomac.

Nevertheless, Maryland has cited the doctrine of prescription and acquiescence in opposing a motion for partial summary judgment that Virginia has filed with the Special Master in which Virginia seeks a declaration that a Compact that Maryland and Virginia formed in 1785 applies to the non-tidal portion of the Potomac River where the proposed waterway construction activity underlying this suit is to occur. Disputing Virginia's claim that the Compact confers any rights in that portion of the Potomac, Maryland has argued that the doctrine of prescription and acquiescence bars Virginia from asserting such a claim. In response, Virginia has argued in its Reply Brief that Maryland has not pleaded the doctrine in its Answer and so cannot rely on it even in the context of argument at this point.

Accordingly, while Maryland does not believe it is necessary to plead the doctrine of prescription and acquiescence in its Answer, it seeks leave to do so at this early stage of the case to avoid litigating any waiver argument Virginia may raise in the future.

For the reasons stated, the State of Maryland respectfully requests leave to file an amendment to its July 31, 2000 Answer pleading the affirmative defense of prescription and acquiescence.

Respectfully submitted,

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AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

No. 129 Original

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COMMONWEALTH OF VIRGINIA,
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v.

STATE OF MARYLAND,
Defendant.

AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

61. Maryland incorporates each and every admission, denial, and averment made by Maryland in Paragraphs 1 through 60 of its Answer and Counterclaim as though fully set forth herein. Maryland asserts separately and/or alternatively, even if inconsistent, the following affirmative defense:

EIGHTH AFFIRMATIVE DEFENSE

62. Virginia's claims are barred by the doctrine of prescription and acquiescence.

Respectfully submitted,

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MOTION FILED
FEB 27 2003

(17)

No. 129 Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AUDUBON NATURALIST SOCIETY AND BRIEF OF AUDUBON NATURALIST SOCIETY IN SUPPORT OF STATE OF MARYLAND

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34 pp

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF AUDUBON NATURALIST SOCIETY

The Audubon Naturalist Society (ANS) respectfully moves the Court for leave to file this *amicus curiae* brief in support of the State of Maryland. The State of Maryland has consented to ANS filing this *amicus* brief. *See* Letter from Andrew H. Baida to Christopher D. Man of 2/3/03 (filed with the Court). But consistent with its practice of withholding consent to *amici* with adverse views in this case, the Commonwealth of Virginia has withheld its consent for ANS to file this brief. Despite prior objections from the Commonwealth, this Court has granted ANS permission to participate as an *amicus* in earlier proceedings in this case. *See Virginia v. Maryland*, 530 U.S. 1201 (2000) (granting ANS' motion to file an *amicus* brief in opposition to the Bill of Complaint over the Commonwealth's objection). The same interests that justified ANS' involvement in prior proceedings justifies granting ANS the right to participate at this stage of the case.

Established in 1897, ANS is the oldest naturalist organization in the Washington metropolitan area, with more than 10,000 members from Virginia, Maryland and Washington, D.C. ANS and its members have a long history of both protecting and using the Potomac River. ANS' involvement in this litigation began in 1998, when the Fairfax County Water Authority proposed constructing a mid-river intake in a segment of the Potomac that is within the State of Maryland. For well over forty years, ANS has organized bird watching and guided nature tours near that intake. ANS also conducts kayaking and canoe trips along this portion of the Potomac. Indeed, prior kayaking trips had traversed the exact area where the proposed intake eventually was built. ANS also has offered nature photography courses and graduate environmental courses for Virginia's teachers in that area.

ANS depends on those activities and others like them to attract new members and promote member participation.

These activities also provide a forum in which ANS can teach its members and the public about the importance of conservation. ANS has found that the natural environment provides the best classroom for teaching environmental values.

ANS believes that this Court would benefit from hearing the views of the persons who actually use the Potomac River and who will be impacted by the Court's decision. Moreover, many of the issues raised by ANS either are not addressed in as much detail by the parties or are not addressed by them at all. For example, ANS alone demonstrates that the Commonwealth does not represent the views of all Virginians through affidavits by some of ANS' Virginia members, thus rendering the Commonwealth without standing to bring this *parens patriae* action on behalf of all Virginia citizens.

For these and other reasons addressed in more detail in the accompanying *amicus* brief, ANS respectfully requests that the Court grant it leave to file its *amicus curiae* brief.

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February 27, 2003

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IN THE

Supreme Court of the United States

No. 129 Original

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

AMICUS CURIAE BRIEF OF AUDUBON NATURALIST SOCIETY

INTEREST OF *AMICUS CURIAE*

Although the Fairfax County Water Authority's (the "Authority") intake has been built and there is no longer any live controversy between the states, the Commonwealth's request for sweeping declaratory relief threatens ANS' interests.[1] The Commonwealth requests that Virginians (and by implication Marylanders) be given the unfettered right to withdraw water from the Potomac River and construct whatever they like in parts of the river that are within the State of Maryland, and do so free from Maryland's regulatory oversight. Virginia obviously cannot regulate activities with-

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[1] No counsel for a party authored any part of this brief. No person or entity other than *amicus* and its counsel made any monetary contribution towards the preparation or submission of this brief.

in the State of Maryland, so a ruling barring Maryland from regulating water withdrawals and construction in the Potomac would produce a dangerous regulatory void. ANS is concerned that this regulatory void will lead to a tragedy of the commons, where the unregulated use of a public resource leads to the destruction of that resource. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Under such a scenario, the interests of ANS and its members would plainly suffer.

ANS believes that the flow of the Potomac River should be preserved for all living things that depend upon a minimum flow of the river for their survival, and that the aesthetic beauty of the river should not be disturbed unnecessarily through the construction of a multitude of structures on the Potomac. ANS agrees with Justice Holmes' now-famous observation: "A river is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This treasure belongs to all of the people, and water withdrawals from the river and construction upon the river should be carefully regulated so that the river's many uses can be enjoyed by all. An unguarded treasure will surely be lost.

In addition, ANS' members in Virginia are particularly concerned by the Commonwealth's attempt to represent them as *parens patriae*. ANS has submitted affidavits from two of its many members who opposed the Authority's intake on environmental grounds and who object to the Commonwealth's claim to represent their interests as *parens patriae*. (De Noyer Aff., ANS Br. in Opp'n Bill of Compl. at 7a-8a, *Virginia v. Maryland*, (U.S. Apr. 21, 2000) (No. 129)); (Ridder Aff., *id.* at 4a-6a.) Dr. De Noyer is among the country's most respected geophysicists, with nearly fifty years of experience, and has served as the Chairman of the Fairfax County Environmental Quality Advisory Council. He

also is a customer of the Authority and, as an elected member of the Herndon Town Council, represents an entire community that drinks the Authority's water. (*Id.* at 4a-5a.) Affiant Marrie Ridder has been appointed Chairman of the Virginia Council on the Environment by two Virginia Governors and is a riparian land owner on the Virginia side of the Potomac River. (*Id.* at 7a-8a.)

ANS' Virginia members are concerned that, by bringing this suit in a *parens patriae* capacity, the Commonwealth could bind them to representations made by the Commonwealth in this litigation.[2] These members may be involved in future litigation against the Commonwealth and land owners who may initiate future construction projects on the Potomac River that threaten these members' interests. The Commonwealth has conceded that it does not represent these parties' true interests, and has gone so far as to suggest that the views of these Virginians "can be adequately represented by the State of Maryland." (Letter from Frederick S. Fisher to Christopher D. Man of 5/28/00, *id.* at 2a-3a.) It would, of course, turn the law of *parens patriae* standing on its head to accept the Commonwealth's claim that it should serve as guardians over ANS' Virginia members when it acknowledges that their interests would be better protected by its adversary.

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[2] *See, e.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) ("[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

SUMMARY OF ARGUMENT

I. The Court should dismiss this cases because there is no live case or controversy. In asking this Court to hear this case, the Commonwealth identified only one Virginia entity—the Authority—that had been denied the right to construct an improvement in the Potomac. But that permit was later granted, and the project has been completed. Nothing more remains of this case than an academic debate between the two states. There is no Virginian with an imminent plan to initiate construction in the Potomac and no Virginian with an imminent plan to withdraw more water from the Potomac than already is authorized by a water appropriation permit issued by Maryland. Consequently, there is no live case or controversy.

II. The Commonwealth lacks standing to sue. The Commonwealth has not shown itself to be directly aggrieved by any action taken by Maryland, but has asserted its right to represent the Authority and other Virginians in this case in a *parens patriae* capacity. But this is not an appropriate case for *parens patriae* standing. This simply is not a case where the people of Virginia face a grave, generalized threat and cannot protect their own interests. The rights afforded to Virginia's riparian landowners under the various compacts can be enforced directly by these landowners, as the Authority did in obtaining a construction permit by appealing the initial denial through Maryland's legal system. And not only can Virginia's riparians defend themselves, many are opposed to having their interests represented by the Commonwealth in this case. In addition, there is no grave, generalized threat to the people of Virginia caused by the State of Maryland that warrants providing the Commonwealth *parens patriae* standing in this case. The Commonwealth cannot identify any existing injury whatsoever to any Virginian caused by the State of Maryland.

III. The Commonwealth's suggestion that its citizens were afforded absolute rights to the Potomac under various compacts—free from police power regulation—is contrary to the common law principles incorporated into those compacts. The compacts at issue do not abrogate Maryland's police power. The Compact of 1785 and its progeny establish only a principle of nondiscrimination: The riparian rights of citizens of Virginia and of Maryland along the Potomac River are to be respected equally. Riparian rights are not absolute, but always have been subject to regulation. In particular, the right to wharf out and make improvements does not vest until the wharf or improvement has been made. Until that occurs, their construction can be regulated or even prohibited. Similarly, the right to make water withdrawals always has been subject to limitation; for example, the water cannot be wasted or diverted from the riparian lands. Accordingly, even if the Court finds a live controversy and that Virginia has standing, the Court should conclude that Maryland can continue to regulate the exercise of riparian rights by Virginia and Maryland landowners in an evenhanded manner.

ARGUMENT

I. THIS COURT LACKS JURISDICTION.

While it is clear that the Commonwealth of Virginia and the State of Maryland fundamentally disagree as to the meaning of the Compact of 1785 and its progeny, there is no concrete dispute between the states. The impetus for the Commonwealth filing the Bill of Complaint was Maryland Department of the Environment's decision to deny the Authority a permit to construct a mid-river intake. But since the Court agreed to hear the case, the State of Maryland granted the Authority the necessary permit and the intake has been constructed. This case is now moot based on the orig-

inal facts presented to the Court, and the Commonwealth has not identified any other dispute between a Virginia entity and the State of Maryland that would justify retaining jurisdiction.

A. The Completion of the Authority's Intake Moots the Commonwealth's First, Second and Third Prayers for Relief.

In addressing the Commonwealth's Third Prayer for Relief, requesting that Maryland be enjoined from requiring the Authority to obtain a construction permit before building the intake, the Special Master explained: "That permit has been granted, and that intake pipe has been constructed. Hence, Virginia's Third Prayer is moot." Report of the Special Master, *Virginia v. Maryland*, at 9 (U.S. Dec. 9, 2002) (No. 129) [hereinafter Report]. The recommendation to dismiss the Third Prayer for Relief is correct, but fails to recognize that the same underlying events mooted the First and Second Prayers for Relief as well.

Like the Third Prayer for Relief, the First and Second Prayers both depend upon the Authority's dispute with the State of Maryland to remain a live controversy. The Commonwealth's First Prayer was for a declaratory judgment that the Compact of 1785, the Black-Jenkins Award of 1877, and Compact of 1958 all applied upstream of the tidal reach of the Potomac River. (Report at 9.) At the time the Bill of Complaint was filed, the Authority was the only Virginia entity in dispute with the State of Maryland concerning construction in the Potomac above tidewater. Now that that dispute has been resolved, there is no dispute between any Virginia entity and the State of Maryland over whether the various agreements apply above tidewater. Accordingly, the case is moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of

the litigation (standing) must continue throughout its existence (mootness).'") (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).

Similarly, the Second Prayer for Relief requested a declaratory judgment that Maryland could not require any Virginia entity to obtain a construction permit before constructing an improvement in the Potomac River. (Report at 9.) But again, the only live dispute between a Virginia entity and the State of Maryland at the time the Bill of Complaint was filed concerned the Authority's permit for a mid-river intake. With that controversy now resolved—and with no new controversy having yet emerged—the Commonwealth's Second Prayer is moot as well.

B. The Commonwealth's Fourth Prayer for Relief Is Not Ripe.

The Commonwealth's Fourth Prayer for Relief—requesting the Court to enjoin Maryland from requiring water appropriation permits from Virginia entities before they can withdraw water from the Potomac River—was never ripe.[3] Maryland has denied neither the Commonwealth nor any Virginian the right to appropriate water from the Potomac

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[3] In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hr'g Br. of the Auth., ANS Br. in Opp'n Bill of Compl. at 47a-48a, *Virginia v. Maryland*, (U.S. Apr. 21, 2000) (No. 129).) The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. (*Id.* at 47a.) The Authority also claimed that the capacity of the treatment plant would prevent it from increasing its appropriation. (*Id.* at 48a ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").)

River and the Authority explicitly has disclaimed any intention of seeking an increase in its water appropriation in the near future. In its opening brief, the Commonwealth rightly conceded this: "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River . . . ." (Va. Br. in Supp. Bill of Compl. at 29, *Virginia v. Maryland*, 530 U.S. 1201 (2000) (No. 129).) Subsequently, General Earley—Virginia's Attorney General when this case was filed—conceded this claim's lack of ripeness by reportedly saying "'our case is very clear cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*'" *Earley Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (emphasis added).[4]

The fact that there is no Virginia entity seeking to withdraw more water from the Potomac River than already is authorized by a Maryland water appropriation permit demonstrates that there is no ripe challenge to Maryland's permitting scheme. *See, e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future"); *New Jersey v. Sargent*, 269 U.S. 328, 339 (1926) (rejecting New Jersey's challenge to the Federal Water Power Act premised upon its claimed intention to begin water power development because "the state is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project").

Despite these shortcomings in the Bill of Complaint, the Special Master allowed this claim to remain in the case for three reasons: First, the Special Master concluded that fed-

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[4] The *Fairfax Journal* also reported that "'[i]f Maryland agrees to issue the permit, Virginia will withdraw its case with alacrity,' [Attorney General Earley] added." *Earley Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1.

eral jurisdiction is available to all claims so long as jurisdiction exists as to any one claim. (Special Master's Mem. of Decision No. 2 at 2, *Virginia v. Maryland*, (U.S. Dec. 28, 2000) (No. 129).) Second, the Special Master concluded that the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2000), authorized the Court to resolve purely legal disagreements between the states. (*Id.* at 2-3.) Third, the Special Master concluded that this Court implicitly ruled that it had jurisdiction by agreeing to hear the case. (*Id.* at 3-4.) Each of these conclusions is mistaken.

Claim-by-claim analysis. The Special Master's conclusion that the Court can resolve all claims brought by the Commonwealth so long as it has jurisdiction to decide any one claim is wrong as a matter of law and irrelevant now that the Commonwealth's remaining claims are moot. While it is true that the existence of subject matter jurisdiction over any one claim is sufficient to present an Article III case or controversy with respect to that claim, such a finding does not eliminate the need for the Court to consider its jurisdiction to decide the remaining claims.

Federal courts must have subject matter jurisdiction over each claim in a case before them. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). Even if the Court were to conclude that a justiciable case exists with regard to one claim, those claims that are moot, not ripe, or that the Commonwealth lacks standing to assert must be struck from the Bill of Complaint. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 341 (1931) (rejecting a claim in a Bill of Complaint on ripeness grounds); *New York v. Illinois*, 274 U.S. 488, 489 (1927) (upholding Special Master's decision to strike a claim from a Bill of Complaint on ripeness grounds).

The Declaratory Judgment Act. Likewise, the Special Master erred in assuming that the Declaratory Judgment Act nullified Article III's constitutional limitation on this Court's jurisdiction. This Court explicitly has held that "federal courts established pursuant to Article III of the Constitution do not render advisory opinions . . . . '[C]oncrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) (internal citations omitted); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (explaining that congressional legislation would violate Article III if it attempted to confer standing on persons who had not actually been injured); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-78 (1992) (holding that Congress cannot legislate around Article III's requirements). In elaborating upon the case or controversy requirement, this Court has explained that "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal citations omitted) (addressing claim for declaratory relief). Thus, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citations omitted) (addressing claim for declaratory relief). Plainly, the academic dispute between the two states on the meanings of the various compacts—whether raised in the declaratory judgment context or otherwise—is inadequate to place a live case or controversy squarely before the Court.

Law of the case. By granting Virginia leave to file the Bill of Complaint over jurisdictional objections, this Court appears to have followed its "normal practice of permitting

the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting). It would appear peculiar for the Court to have used its limited resources to reach a decision on its subject matter jurisdiction without a full briefing of the issue by the parties and at the preliminary stage of allowing a Bill of Complaint to be filed. *Cf. Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."). The Court has "often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Nevertheless, the Special Master has inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint that the Court implicitly rejected jurisdictional arguments that previously had been made. (Special Master's Mem. of Decision No. 2 at 3-4.) Regardless of what the Court intended in granting Virginia leave to file its Bill of Complaint, the record now demonstrates conclusively that jurisdiction does not exist. The case, therefore, should be dismissed.

II. THE COMMONWEALTH LACKS *PARENS PATRIAE* STANDING TO PURSUE THE CLAIMS OF RIPARIAN LANDOWNERS ON VIRGINIA'S SIDE OF THE POTOMAC RIVER.

Article VII of the Compact of 1785 concerns the riparian rights of the citizens of Virginia and Maryland, not the sovereign rights of those states. By its express terms, Article VII provides a "privilege" of making improvements in the river to the "*citizens* of each state respectively . . . in the shores of the Patowmack river *adjoining their lands*." Compact of 1785, art. VII, 1785-86 Md. Laws ch. 1, 1785 Va.

Acts ch. 17 (emphasis added).[5] Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so with the very counsel the Commonwealth now relies upon. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit, initiated litigation before a Maryland administrative law judge to obtain the permit and ultimately prevailed. Plainly, it was the Authority and not the Commonwealth that was the real party in interest when this case began. And, in the event other Virginia riparians decide to pursue similar projects in the river, they—and not the Commonwealth—will be the real party in interest to assert their rights.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority and other riparians, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state may become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, *id.* § 1332. Even then, jurisdiction is limited to the lower federal courts.

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[5] At the very least, acknowledging that the only Virginia beneficiaries to Article VII are Virginia's riparian landowners requires a substantial narrowing of the relief recommended by the Special Master. The Special Master recommends that Article VII's rights, as he interprets them, be extended to "Virginia, its governmental subdivisions, and its citizens." (Report at 14 (Recommendations I.A & I.B.).) To accept those recommendations, the Court would be rewriting and substantially expanding the Compact.

By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a state shall be a party," U.S. Const., art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue. Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900). *Compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states), *with id.* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900). The Commonwealth cannot circumvent this requirement by supplementing the claims of its citizens with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress

> private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania v. New Jersey, 426 U.S. 660, 665-66 (1976).[6]

B. The Commonwealth Is An Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal challenges to a permit denial by Maryland. This Court cannot hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

By its plain language, Article VII of the Compact does not vest any right in the Commonwealth but instead confers rights upon third parties—Virginia and Maryland riparian land owners. Where compacts confer rights upon third

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing one state to sue another state on behalf of its citizens. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil Co.*, 405 U.S. at 259 n.12; *Cook*, 304 U.S. at 392-93.

parties, those parties have standing to assert those rights independently of their states. Indeed, riparians and other third-party beneficiaries often have done so under this very Compact. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921); *Evans v. United States*, 31 App. D.C. 544 (1908); *Ex Parte Marsh*, 57 F. 719 (E.D. Va. 1893). Moreover, third party beneficiaries to a compact are not bound by their state's own construction of the compact—they can even sue to challenge their own state's construction of the compact. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911); *Green v. Biddle*, 21 U.S. 1 (1823).

Applying *parens patriae* standing also would bind an enormous class of persons to a litigating position that is hostile to the interests of many of its class members, including ANS' Virginia members who are customers of the Authority, (*see* DeNoyer Aff., ANS Br. in Opp'n Bill of Compl. at 4a-6a), and riparians on the Potomac, (*see* Rider Aff., ANS Br. in Opp'n Bill of Compl. at 7a-8a); *see also supra* note 2 (listing cases finding *parens patriae* actions binding on the state's citizens). The Commonwealth itself concedes that the interests of these Virginians would be better represented by its adversary—the State of Maryland. (Letter from Frederick S. Fisher to Christopher D. Man of 5/28/00, *id.* at 2a-3a (explaining that ANS' Virginia members' interests "can be adequately represented by the State of Maryland").) Allowing direct actions by individuals, like the one the Authority pursued, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment or to protect its citizens from a common injury caused by another state, but this is not such a case. There are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth has not identified even a single Virginia riparian who has submitted a pending water appropriation request to Maryland, and the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.) And there is no valid claim that the existence of Maryland's regulatory regime for construction projects on the river and water appropriation permits poses a detriment to the citizens of Virginia generally. To the contrary, those regulations help protect the river and all who use it, riparian land owners in particular.

With no particular construction project or water appropriation request by any Virginian being blocked by Maryland, it is hard to conceive of any generalized injury to the people of Virginia that would warrant granting the Commonwealth *parens patriae* standing in this case. Of course, any such conjecture on the Commonwealth's part would be outside the record and inadequate to confer federal jurisdiction.

This Court has stated that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and that "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422

U.S. 490, 517-18 (1975)). The Court also has emphasized that "[b]efore this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence," *New York v. New Jersey*, 256 U.S. 296, 309 (1921), and the petitioning state must "demonstrate that the injury for which it seeks redress was directly caused by the actions of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth . . . . The solution [has been] to saddle the party seeking relief with an unusually high standard of proof . . . ."). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical,'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal citations omitted), and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal citation omitted). There is nothing in the record that even remotely suggests by clear and convincing evidence that Maryland poses a real and immediate threat to the people of Virginia. There is nothing in the record suggesting any current threat of any magnitude at all.

III. THE COMPACT OF 1785 AND ITS PROGENY DO NOT PROVIDE RIPARIAN LANDOWNERS ABSOLUTE RIGHTS.

A. Riparian Rights Were Not Absolute at Common Law.

The Special Master erroneously viewed the "privilege" afforded riparian landowners on both sides of the Potomac River by Article VII of the Compact of 1785 to wharf out and

make other improvements, and to withdraw water, as vesting them with an absolute right to do so free from any police power regulation. But the rights afforded under the Compact are riparian rights, which always have been understood to be subject to police power regulation. For example, under the common law, riparian landowners were required to make reasonable use of any waters withdrawn, and were precluded from diverting water for non-riparian uses outside the watershed.[7] *See, e.g.*, *Atchison v. Peterson*, 87 U.S. 507, 512 (1874) (identifying common law prohibition against diversion for non-riparian use outside the watershed); *Town of Purcellville v. Potts*, 179 Va. 514, 521 (1942) ("While a riparian owner is entitled to a reasonable use of the water, he has no right to divert it for use beyond his riparian land, and any such diversion and use is an infringement on the rights of the lower riparian proprietors who are thereby deprived of the flow. Such a diversion is an extraordinary and not a reasonable use."). These rights can be restricted when necessary to protect the general welfare. *See, e.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) ("The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."). This Court also has explained that the riparian right of wharfing out and making improvements does

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[7] In modern times, most people receive water from their municipality and entities like the Authority. Because this involves diverting water from rivers for non-riparian use, it would not have been sanctioned at common law. *See, e.g.*, *Town of Purcellville*, 179 Va. at 522-23. "In the eastern states, where riparian rights prevail, it was necessary to pass special laws granting authority to companies and even municipalities selling water to their residents to take water for use on non-riparian lands." David H. Getches, Water Law 418 (3d ed. 1997). To the extent that the Commonwealth or the Special Master suggest that the Authority or other riparians are authorized by the Compact to distribute water to non-riparian users, that suggestion is flatly mistaken.

"not vest until exercised, [it is] a mere license, revocable at the pleasure of the legislature unless acted upon." *Shiveley v. Bowlby*, 152 U.S. 1, 56 (1894).

At common law, both Virginia and Maryland recognized that any "privilege" of wharfing out or making improvements in public waterways was subject to police power regulation. The Supreme Court of Virginia explained: "Appellant has built no wharf or pier, nor any like structure. . . . When she does exercise that right, it must be in accordance with such rules and regulations as the commonwealth imposes for the protection of the rights of the public." *Taylor v. Commonwealth*, 47 S.E. 875, 881 (Va. 1904). The Supreme Court of Virginia emphasized that "we think it well established that the right to build wharves is one which is subject to state regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership." *Id.* at 880. Looking to the Compact, other courts have explained that "it is at least a doubtful question whether this compact confers rights upon the riparian proprietor which are not defeasible by legislation." *Potomac Steamboat Co. v. Upper Steamboat Co.*, 11 D.C. (MacArth. & M.) 285 (1880), *aff'd*, 109 U.S. 672 (1884); *see United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 357, 360 (1933) (refusing mandamus because the claim that Article VII of the Compact superseded the authority of the government that owned the bed of the Potomac River to devote the riverbed to a public purpose raised only "doubtful questions" and petitioners were "not shown to be clearly entitled" to an absolute to right to wharf out under the Compact). There is nothing in the language of the Compact or its legislative history to suggest that the states believed they were modifying the nature of riparian rights in any way; they merely were securing the equal enjoyment of those well-understood common law rights for citizens on both sides of the Potomac.

B. Rights Afforded Riparian Land Owners Under Article VII Are Not Absolute.

In construing the Compact and its progeny in *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Court expressed the view that the Commonwealth and Maryland did nothing more than safeguard the riparian rights of their citizens: "[T]he privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river." *Id.* at 580-81; *see Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 64 (1921) (explaining that Article VII of the Compact conferred its rights upon "the citizens of each State"); *see also* Potomac River Compact of 1958, art. VII, § 1, 1958 Md. Laws ch. 269, 1959 Va. Acts ch. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962) (describing Article VII of the Compact of 1785 as "relating to rights of riparian owners"). In the United States' view, Article VII of the Compact "was at most a commercial and political arrangement between sovereigns and the right of individuals under it were not in the nature of grants but remained at all times subject to the control of the contracting parties." Br. of United States at 32, *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933) (No. 677).

Not only would the conversion of the Compact "privilege" into an absolute right to construct potential nuisances free from government regulation be completely foreign to the law of property and traditional understandings of the police power, it is defied by history. The "privilege," as conceived by the Commonwealth, plainly did not survive in the Potomac River within the District of Columbia upon the creation of the District (originally carved out of both Maryland and Virginia). *See Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 66 (1921) (noting that the District had the right to fill in the Potomac along the Virginia shore even though it "will interrupt previously existing access to the water front"). In

United States ex rel. Guesthouse v. Hurley, 63 F.2d 137 (D.C.), *aff'd*, 289 U.S. 352 (1933), the court rejected the claim that Article VII of the Compact required the Secretary of War to issue a dredge and fill permit. The court explained that Article VII's authority to make "wharves or other improvements is treated in the compact as merely a privilege in the nature of an easement that may be continued or destroyed . . . ." *Id.* at 139. Maryland and Virginia had the complete authority to abrogate Article VII privileges after 1785 and, upon joint cessation to the United States to form the District, the United States had the full authority to abrogate Article VII rights. *Id.* at 140. After upholding the Secretary's authority to deny the permit on the basis of public policy not related to navigation, the Supreme Court refused a petition for mandamus because the petitioner's Compact claims raised only "doubtful questions." *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 357 (1933); *see also id.* at 360 (explaining that mandamus was "invoked to protect rights to which petitioners are not shown to be clearly entitled").

Moreover, Article VII would not have been understood as creating any absolute right to wharf out or make improvements in Maryland's waters because such "privileges" could be conferred only through special legislation and would not vest as of right until the construction was completed. In reviewing the governing Maryland cases of the relevant time period, the United States has advised this Court that the "decisions clearly treat the beds of navigable rivers as the exclusive property of the State and not subject to encroachment by the building of wharves or otherwise except with the express permission of the State in the nature of a grant." Br. of United States at 26, *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933) (No. 677); *see also id.* at 24 ("The first *general* grants to riparian proprietors in Maryland to make improvements in the waters in front of their lands and to make wharves was not made until 1835."). Even after such grants were made, a "riparian owner had no vested title to the

land covered by water immediately in front of his property, nor to improvements built out of the water, until the improvements had been actually completed . . . ." *Brady v. Mayor of Baltimore*, 101 A. 142, 143 (Md. 1917) (citing *Giraud v. Hughes*, 1 Gill. & J. 249 (Md. 1829)); *see* Br. of United States at 26, *United States ex. rel. Greathouse v. Dern*, 289 U.S. 352 (1933) (No. 677) (agreeing with this understanding of Maryland law). Moreover, "before the riparian owner had made any improvements in front of his property, the state could intercept his right to make them by a grant of the land covered by water." *Brady*, 191 A. at 143 (citing *Casey's Lessee v. Inloes*, 1 Gill. 430 (Md. 1844)).

The Commonwealth's construction of the Compact presumes the impossible—that its signatories intended to create a regulatory void.[8] In 1785, there was no role for the federal government in regulating the Potomac River and the Commonwealth could not exercise its police power within the Potomac because the river is in Maryland. Consequently, Maryland must have had regulatory authority if any government was to have such a power. Moreover, it is clear from the Compact itself that some governmental entity was to have regulatory authority because Article VII specified that no improvement in the waterway could be made that would

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[8] It is extremely doubtful that the signatories to the Compact would have contemplated that Article VII would affect the police power other than to require that Maryland treat Virginia's riparians the same as its own. The sophisticated politicians that negotiated and approved the Compact recognized the need for a police power that was capable of addressing unforeseen threats to the public interest. *See, e.g.*, Act of November 10, 1769, 8 Henning's Statutes at Large of Virginia 424 (1821) (requiring the wide spread removal of wooden chimneys from homes). Indeed, the police power of Virginia and Maryland was used far more broadly before the signing of the Constitution than it could be today. *See, e.g.*, Act of February 12, 1772, 8 Henning's Statutes at Large of Virginia 643 (1821) (ordering owners of wetlands in Alexandria to drain those lots at their own expense within two years or forfeit their land).

threaten navigation. For this explicit limitation to have any meaning, Maryland would have needed the authority to enforce this limitation in its own waters.

C. The Special Master's Recommendation Barring Any State from Regulating Construction in the Potomac River and Water Withdrawals from the River Would Violate the Public Trust Doctrine.

The Special Master's recommendation that this Court find that the Compact of 1785 provided Virginia riparians, and Maryland riparians by implication,[9] an absolute right to initiate construction projects in the Potomac River and make water withdrawals from the river free of regulatory oversight would pose an unconscionable threat to the State of Maryland's police power and is barred by the public trust doctrine.

It would be difficult to understate the importance of the rights secured by the public trust doctrine, as they lie at the very core of what it means to be a free people. More than 500 years before our colonial ancestors rose up against the King of England to demand the liberties that are now secured by the Bill of Rights, our English ancestors demanded a concession from the Crown that secured citizens the common right to the beds of navigable rivers and the waters that flow over them. In securing those public trust rights for the people in the Magna Carta in 1215, an important buffer was placed between government and the people that has since distinguished our "society as one of citizens rather than serfs." Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 484 (1970); *see also Martin v. Waddell*, 41 U.S.

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[9] Whatever privileges are bestowed upon riparian land owners under Article VII of the Compact of 1785, they were bestowed upon "[t]he citizens of each state respectively." Compact of 1785, art. VII, 1785-86 Md. Laws ch. 1, 1785 Va. Acts ch. 17.

(16 Pet.) 367, 414 (1842) (explaining that the survival of early American settlements would have been impossible without the public trust doctrine); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 553 (1837) (noting that the economy of early America would have been stagnant without the public trust doctrine).

The public trust doctrine requires that the states hold such lands "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The public trust doctrine also protects values that are "recreational and ecological – the scenic views of the [water body] and its shore, the purity of the air, and the use of the [water body] for nesting and feeding by birds." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983).

The public trust rights secured by the Magna Carta were specifically incorporated into the land grant to Lord Baltimore in 1632 and were intended "for the common use of the new community about to be established as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property . . . ." *Morris v. United States*, 174 U.S. 196, 227 (1899). "[U]pon the Revolution the state of Maryland became possessed of the navigable waters of the state, including the Potomac river, and of the soils thereunder, for the common use and benefit of its inhabitants . . . ." *Id.*; *see Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 97 (1838) (explaining that "as the Potomac river is a navigable stream, [it is] a part of the *jus publicum*"); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) ("The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence 'became themselves sovereign; and in that character hold the

absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.'") (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)). Likewise, the Maryland Court of Appeals continuously has recognized that these lands are "held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character." *Bd. of Pub. Works v. Lamar Corp.*, 262 Md. 24, 35 (1971); *see also Smith v. Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855) (recognizing that the State of Maryland holds the beds of its navigable waters "in trust for[] the enjoyment of certain public rights" and has a "duty to preserve unimpaired those public uses for which the soil is held").

The Special Master's construction of the Compact is a direct assault on the rights secured by the public trust doctrine. It would strip the State of Maryland of its fiduciary duty to safeguard the Potomac River for the public use. There is, of course, no reason to believe that the signatories to the Compact had any intention of stripping the public of the rights to the Potomac River that they had enjoyed even as British subjects or that either state had sent their delegation to Mt. Vernon to negotiate the mutual abandonment of their police powers.[10] To the extent this could have been the intention of the signatories, Maryland lacked the authority to enter into the Compact and its progeny and those agreements are void: "The state can no more abdicate its trust over property in which the whole people are interested, like

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[10] The Attorney General of Virginia's description to this Court of the public trust doctrine in Virginia at the time that the Compact was signed demonstrates that the doctrine would have prevented the Commonwealth from accepting the sacrifice of pubic trust rights that it now asserts that Maryland made. *See* Br. *Amicus Curiae* of the Thirteen Original States at 19, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1987) (No. 86-870).

navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Ill. Cent. R. Co.*, 146 U.S. at 543 (invalidating sale of property subject to public trust doctrine).

CONCLUSION

For the forgoing reasons, the Court should either dismiss this case or find that the rights provided by Article VII of the Compact of 1785 and its progeny extend only to riparian land owners in Virginia and Maryland and are subject to even-handed regulation by the State of Maryland.

Respectfully submitted,

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February 27, 2003

(13)

Supreme Court, U.S.
FILED
MAR 31 2003
OFFICE OF THE CLERK

No. 129, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BY THE COMMONWEALTH OF VIRGINIA TO THE STATE OF MARYLAND'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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71 pp

QUESTIONS PRESENTED

1. Did the Special Master correctly find, pursuant to Article Seventh of the Compact of 1785 and Article Fourth of the Black-Jenkins Award of 1877, that Virginia, its political subdivisions and its citizens, do not need to obtain a Maryland permit as a condition of withdrawing water from the Potomac River or of building improvements appurtenant to the Virginia shore?

2. Did the Special Master correctly reject Maryland's argument that Virginia lost its interstate compact rights to withdraw water from the River and to build improvements appurtenant to the shore — without first having to obtain Maryland's permission — considering that: (a) no State has ever lost a federally-approved interstate compact right based on the doctrine of prescription and acquiescence; (b) Virginia state officials did not learn until 1973 that Maryland claimed that its Potomac River permitting requirements applied to Virginia; (c) Virginia, from 1976 through 1979, clearly disputed Maryland's authority; (d) the period of alleged acquiescence is significantly shorter than in any previous case in which prescription has been found; and (e) Virginia filed suit here after the very first instance in which Maryland used its permitting requirements to block a Virginian's access to the River?

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Whyte, William Pinkney, & Jones, Isaac D., *Boundary Line Between the States of Maryland and Virginia, Before the Hon. Jeremiah S. Black, Hon. William A. Graham, and Hon. Charles J. Jenkins, Arbitrators upon the Boundary Line between the States of Virginia and Maryland* (1874) 19

TABLE OF ABBREVIATIONS

Abbreviation	Description
L-#	Lodging Accompanying Reply by the Commonwealth of Virginia (Mar. 31, 2003)
Md. App.	Appendix to the Exceptions of the State of Maryland to the Report of the Special Master (Feb. 27, 2003)
Md. Br. Opp. LTF	Maryland's Brief in Opposition to Motion for Leave to File Bill of Complaint (Apr. 24, 2000)
Md. Exc.	Exceptions of the State of Maryland to the Report of the Special Master (Feb. 27, 2003)
Md. Moot. Mot.	Defendant's Motion to Dismiss on the Basis of Mootness (May 25, 2001)
Md. Moot. Reply Br.	Maryland's Reply to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness (June 13, 2001)
Mem. Dec. No. 1	Special Master's Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions) (Dec. 11, 2000)
Mem. Dec. No. 2	Special Master's Memorandum of Decision No. 2 (Subject: ANS Motion for Reconsideration of the Denial of its Motion to Dismiss for Lack of Subject Matter Jurisdiction) (Dec. 28, 2000)

MX #	The exhibit number assigned to Maryland's evidentiary materials as identified in the Report of the Special Master. *See* S.M. App. G-2.
PMX #	The exhibit number Maryland originally (previously) assigned to evidentiary materials it submitted to the Special Master.
PVX #	The exhibit number Virginia originally (previously) assigned to evidentiary materials it submitted to the Special Master.
Report	Report of the Special Master (Dec. 9, 2002)
S.M. App.	Report of the Special Master Appendices (Dec. 9, 2002)
Tr. (4/24/02)	Transcript of Oral Argument before the Special Master, Defendant's Motion for Summary Judgment (Apr. 24, 2002)
VX #	The exhibit number assigned to Virginia's evidentiary materials as identified in the Report of the Special Master. *See* S.M. App. G-1.

This case is about Virginia's rights to withdraw water from the Potomac River and to construct improvements appurtenant to the Virginia shore without first having to obtain Maryland's permission. These rights, implicit in federal common law, were expressly secured by Article Seventh of the Compact of 1785 and Article Fourth of the Black-Jenkins Award of 1877, and preserved in Article VII, § 1, of the Potomac River Compact of 1958, and in the Potomac River Low Flow Allocation Agreement of 1978. The Special Master correctly concluded that Maryland's permitting system, as applied to Virginia, violates Virginia's rights.

STATEMENT OF THE CASE

A. The Colonial Charters and Interstate Compacts.

Contrary to Maryland's claim that its ownership of the Potomac River has been well settled at all times since 1632, control of the Potomac has been disputed for centuries. The original territories of Virginia and Maryland were the subject of inconsistent and conflicting royal charters and patents. *See Maryland v. West Virginia*, 217 U.S. 1, 24-29 (1910); *Morris v. United States*, 174 U.S. 196, 223 (1899). Virginia's territorial claims derived from three charters, issued to the London Company by King James I in 1606, 1609 and 1612, *see* 1 Hening's Statutes at Large 57-110 (1823); and a patent issued in 1649 by King Charles II to Lord Hopton and others for what became known as Virginia's "Northern Neck," confirmed by a later patent issued in 1688 by King James II to Thomas Lord Culpeper. *Morris*, 174 U.S. at 223. The 1609 Charter extended Virginia's territory from Point Comfort (located at the mouth of the James River) to 200 miles north and south, and from sea to sea, thereby including all of what is now the State of Maryland. Second Charter, Art. 6 (May 23, 1609), *reprinted in* 1 Hening's Statutes at Large 80, 88 (1823). The patent for the Northern Neck was bounded by the Potomac and Rappahanock Rivers. It specifically included "the said rivers themselves and all the islands within the outermost banks thereof. . . ." *Morris*, 174 U.S. at 223. Under both the 1609 Charter and the later patents for the Northern Neck, the entire Potomac River was in Virginia.

Maryland based its territorial claims on the Charter of 1632 from King Charles I to Lord Baltimore. The Charter was written in Latin and the original document has been lost. (S.M. App. D-2.)[1] Under the translation accepted by the Court in 1910 in *Maryland v. West Virginia*, the grant described the territory as running west from the Delaware Bay along the 40° parallel, to the "true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river" (*ad ulteriorem dicti Fluminis Ripam*), "and following it to where it faces the western and southern coasts . . . near the mouth of the same river, where it discharges itself in the aforenamed bay of Chesapeake. . . ." 217 U.S. at 25. Virginia disputed whether this description actually included the Potomac River.

Although Virginia's Constitution of 1776 relinquished its claims to territories contained in the charters of neighboring colonies, including Maryland, it specifically reserved "the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Va. Const., Art. XXI (1776), *reprinted in* 1 Hening's Statutes at Large 50, 56 (1823). Delegates to Maryland's constitutional convention rejected this reservation, however, asserting that "the sole and exclusive jurisdiction over the . . . river Potowmack . . . belongs to this state." (Report at 4.)

The dispute over control of the Potomac River went unresolved. For example, in October 1776, just four months after Virginia adopted its Constitution, the sheriff of Fairfax County arrested a Maryland citizen who was operating a ferry in competition with a Virginia ferry established on George Mason's property. (L-133.) The Marylanders complained to Thomas Johnson, a delegate to Maryland's constitutional convention of 1776, that the Potomac River was "being wholy [sic] claimed by the State of Virg[inia]." (*Id.*)

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1. A Table of Abbreviations used for citations to materials in the record appears at xviii.

The Virginia and Maryland legislatures appointed commissioners in December 1777 to settle the States' jurisdiction over the Potomac and Pocomoke Rivers and the Chesapeake Bay, but the commissioners never met. (*See* Report at 5.) After the War of Independence, Virginia again appointed commissioners, in June 1784, citing the "great inconveniences" resulting from the "want of some concerted regulations, between this State and the State of Maryland, touching the jurisdiction and navigation of the River Patomac." *Journal of the House of Delegates of the Commonwealth of Virginia*, May Session, 1784, at 84 (White ed. 1828) (MX 16/PMX Opp. 40). Maryland reappointed its commissioners in January 1785 "to adjust and settle the jurisdiction to be exercised by the said states respectively" over the Potomac and Pocomoke Rivers and the portion of the Chesapeake Bay in Virginia. *Votes and Proceedings of the House of Delegates of the State of Maryland*, November Session, 1784, at 113 (MX 23/PMX Opp. 59). This occurred during the same period in which the States were jointly chartering the Potomac Company for the purpose of improving the navigation of the Potomac River as far west as practicable. (*See* L-647 to L-662; L-686 to L-687 (chronology).)

The commissioners met at Mount Vernon in March and negotiated the Compact of 1785. *See* 2 *Papers of George Mason* 812-28, 835-38 (Robert A. Rutland, ed., 1970). (*See also* L-658 to L-661.) The Compact's stated purpose was "to regulate and settle the jurisdiction and navigation of" the Potomac and Pocomoke rivers, and that part of Chesapeake bay "which lieth within the territory of Virginia. . . ." (S.M. App. B-1 (Preamble).) Consistent with the States' recent chartering of the Potomac Company, and "with a view to opening up a route to the West," *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 64 (1921), Article Sixth recognized the Potomac River "as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States. . . ." (S.M. App. B-3.) Article Eighth required concurrent legislation to enact laws "necessary for the preservation of fish" and for "preserving and keeping open the channel and navigation" of the River. (*Id.*) Article Seventh, at issue in this case, guaranteed to the "citizens of each state respectively . . .

full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river . . . ." (*Id.*) It also provided that "the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states." (*Id.*) The Compact was duly ratified and each State pledged never to repeal it without the other's consent. 1785-86 Md. Laws ch. 1 (S.M. App. B-7 to B-8); 1785 Va. Acts ch. 17.

As a result of the Compact of 1785, Virginia and Maryland enjoyed a lengthy period of cooperation in matters concerning the Potomac River. They enacted various concurrent legislation regulating fishing in the River. *See generally* Carl N. Everstine, *Research Report No. 26: The Compact of 1785* at 5-6 (1946) (surveying concurrent legislation) (VX 70/PVX 73). They also jointly oversaw the operations of the Potomac Company and its successor, the Chesapeake and Ohio Canal Company, enacting concurrent legislation relating to both. (*See* L-676.) Thomas Jefferson described the Potomac River as "common to Virginia and Maryland. . . ." *Notes on the State of Virginia* 1 (2d Am. ed. 1794) (VX 227/PVX 338). In 1787, James Madison cited the Potomac River as proof that "[a] concurrent jurisdiction is both practicable and equitable," reflecting the "equal & reciprocal rights of the owners of opposite shores, over the stream itself." 9 *Papers of James Madison* 230-31 (Robert A. Rutland, ed., 1975) (VX 248/PVX 111).[2] In 1804, John Mason, a director of the Potomac Company, described the River as "a common highway belonging equally to Virginia and Maryland, and the common boundary between them." (VX 131/PVX 88.)

Despite the two States' harmonious use of the Potomac River, the Compact had "left the question of boundary open to long continued disputes." *Marine Ry.*, 257 U.S. at 63-64. That uncertainty was reflected in the first official map of the

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2. Maryland's selective quotation from an earlier letter by Madison to Jefferson in March 1784 (Md. Exc. at 21), is taken out of context. (*See* L-692 to L-700.)

State of Maryland, prepared by Dennis Griffith in 1794 and funded partially by the Maryland General Assembly. Rendered more than 150 years after the 1632 Charter from Charles I to Lord Baltimore, the map plainly showed the boundary line running down the middle of the entire River. (Report at 50-51 & n.68.)[3]

For nearly 100 years following the Compact of 1785, the States unsuccessfully attempted to fix their mutual boundary. Those efforts were chronicled in *Maryland v. West Virginia*, 217 U.S. at 31-37. *See also Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838) ("Maryland and Virginia were contending about boundaries in 1835 . . . and the dispute is yet an open one."). In 1861, a Virginia commissioner reported to the Virginia Governor that if the original 1632 Charter to Lord Baltimore had not been lost and the surviving copies mistranslated, "no reasonable doubt would ever have existed that the whole Potomac river, from its source, wherever fixed, and whenever ascertained, to its mouth, was wholly without the limits of Maryland, and within the bounds of Virginia." *Report of Col. A.W. McDonald to Gov. Letcher* (Mar. 1861), *reprinted in Virginia's Claim to the Potomac River*, 9 Hist. Mag. & Notes & Queries 13, 15 (1865) (VX 239/PVX 96).

The most serious efforts to resolve the controversy occurred when commissioners from both States met in 1872 and 1873. The Maryland Commissioners believed that the boundary should be drawn at the low-water mark on the Virginia shore, while recognizing Virginia's right to build wharves and improvements from the shoreline in accordance with the Compact of 1785. *See* Commission on Boundary Lines Between Virginia and Maryland (1870-1874), *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia, Authorized by the Act of 1872, chapter 210* at 42, 53, 140 (Annapolis 1874) (L-22, L-27, L-70) [hereinafter "Maryland Boundary Commissioners' Report"]. The Virginia Commissioners, on the other hand,

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3. A digital image of the map can be viewed at the Library of Congress website: http://hdl.loc.gov/loc.gmd/g3840.ct000307 (last visited Mar. 21, 2003).

insisted on a boundary on the Maryland side of the River. *Id.* at 54, 310, 312, 329 (L-28, L-111, L-112, L-120). They argued that Virginia owned the entire River because it was part of the territory conveyed under the 1609 Charter from King James I. *Id.* at 237-38 (L-74 to L-75). They rejected Maryland's claim that the Virginia Charters had been rendered invalid in a *quo warranto* proceeding against the London Company in 1624, arguing that the revocation of the Company's powers did not affect the territorial rights of the colony. *Id.* at 240-42 (L-76 to L-77). The United States, they pointed out, had recognized Virginia's territorial rights under the 1609 Charter when it accepted Virginia's cession of the Northwest Territory. *Id.* at 241, 243 (L-76, L-77).[4]

Furthermore, the Virginia Commissioners specifically disputed Maryland's claim that the 1632 Charter to Lord Baltimore included the entire Potomac River. They pointed out that the River actually flows in a *northwesterly* direction from its "first fountain" before circling back to flow generally in a southeasterly direction. *Id.* at 257-58 (L-84 to L-85).[5] Thus, "the ulterior bank of the river was geographically the *left* bank thereof. The line thus mathematically was fixed on the *north* side of the Potomac." *Id.* at 258 (second emphasis added) (L-85). The patent for the Northern Neck simply confirmed that Virginia's territory included the entire Potomac River. *Id.* at 254-55, 258 (L-83, L-85).

The Virginians further buttressed their argument by reference to a map prepared by the Geographer to the King according to the Treaty of Paris of 1763. That map clearly showed the boundary line on the *Maryland* side of the River. *Id.* at 304-05 (L-108).[6] It recited: "The Limits of His Majesty's

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4. The territorial rights of Kentucky, Illinois, Indiana and Ohio were all premised on the validity of Virginia's original grants from King James I. *See Ohio v. Kentucky*, 444 U.S. 335, 338 (1980); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 609-10 (1899); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890); *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 376 (1820).

5. *See* Plate No. 1, *Maryland v. West Virginia*, 217 U.S. 1, 26 (1910).

6. *See* Emanuel Bowen, *An Accurate map of North America. Describing and distinguishing the British and Spanish dominions of this great continent;* (Cont'd)

several Provinces are here laid down *as they at present exercise their* jurisdictions." *Id.* at 305 (L-108). The map identified a number of colonial boundaries that "are not yet finally determined," but the boundary between Virginia and Maryland was not among them. *Id.* Thus, Virginia's Constitution of 1776 did not cede the Potomac River to Maryland as part of the territory covered by the 1632 Charter because that Charter did *not* include the Potomac River, and because the Virginia Constitution specifically stated that Virginia's western and northern extent " 'shall *in all other respects stand as fixed by the charter of King James the 1st, in the year 1609, and by the public treaty of peace between the Courts of Great Britain and France in the year 1763. . . .*' " *Id.* at 309 (*quoting* Va. Const., Art. XXI (1776) (alteration in original)) (L-110).

In 1874, Virginia and Maryland submitted the boundary dispute to arbitration. The enabling legislation specifically reserved to each State and its citizens the rights set forth in the Compact of 1785. *See* 1874 Va. Acts ch. 135, § 1 (L-169); 1874 Md. Laws ch. 247, § 1 (L-171). A later enabling Act further protected the property rights of any citizens affected by the boundary award. *See* 1876 Md. Laws ch. 198, § 1 (L-173); 1876 Va. Acts ch. 48, § 1 (L-175).

On January 16, 1877, the arbitrators issued their award (S.M. App. C), together with a lengthy opinion (*id.* D). Jeremiah S. Black and Charles J. Jenkins fixed the boundary at the low-water mark on the Virginia side of the River, running from headland to headland. (*Id.* C-1 to C-4, D-17 to D-19.) James B. Beck agreed with that conclusion but dissented as to the location of the boundary line across the Chesapeake Bay and the Eastern Shore. (*Id.* D-33.) The arbitrators interpreted the 1632 Charter to Lord Baltimore as specifying the "south bank" of the River as the boundary, not the Maryland side. (*Id.* D-8.) While the original charter would have called for a boundary at the high-water mark (*id.* D-9), the arbitrators found that

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(Cont'd)

according to the definitive treaty concluded at Paris 10th Feby. 1763. A digital image may be viewed at: http://hdl.loc.gov/loc.gmd/g3300.ar002300 (last visited March 21, 2003).

"this is not the present boundary." (*Id.* D-17.) Virginia had acquired title to the low-water mark, as well as the right to use the River beyond the low-water mark, through a long period of prescription dating to "the earliest period of her history. . . ." (*Id.* D-18.) That use was specifically protected by Virginia's Constitution of 1776 and by the Compact of 1785, to which Maryland had assented. (*Id.*) Article Fourth of the Award thus provided that:

> Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has *a right to such use of the river beyond the line of low-water mark* as may be necessary to the *full enjoyment* of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, *agreeably to the compact of seventeen hundred and eighty-five*. (*Id.* C-4 to C-5 (emphasis added).)

Both States ratified the Award. 1878 Md. Laws ch. 274 (L-176), 1878 Va. Acts ch. 246. Congress gave its consent in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481. In *Wharton v. Wise*, 153 U.S. 155 (1894), the Court held that the ratification of the Award by Congress, "taken in connection with the conditions upon which the award was authorized, operated as an approval of the *original compact*, and of its continuance in force under the sanction of Congress." *Id.* at 173 (emphasis added).

For eighty years following the Black-Jenkins Award, the two States enjoyed cooperative relations and passed various concurrent laws respecting the River. Everstine, *supra*, at 6. (*See also* Report at 66-67.) That peace was broken in 1957, when Maryland attempted to assume unilateral authority over fishing and oyster regulation in the tidal Potomac and to abrogate the Compact of 1785 entirely. Virginia was granted leave to file suit against Maryland in this Court, 355 U.S. 269 (1957), but the parties resolved their dispute by the Potomac River Compact of 1958. (*See* Report at 67-68.) The 1958 Compact created the Potomac River Fisheries Commission – comprised equally of representatives from both States – to regulate fishing in the tidal Potomac. (*Id.*; S.M. App. E-11 to E-23.)

The 1958 Compact superseded the Compact of 1785, but Article VII, § 1 of the new compact specifically preserved the rights set forth in Article Seventh of the original Compact. (Report at 67-68.) The language of Article Seventh of the 1785 Compact thus "remains in effect today. . . ." (*Id.* at 44.)

B. The Present Controversy.

During the previous hundreds of years in which ownership and control of the Potomac River was disputed, Maryland had never prevented any Virginian from withdrawing water from the River or building improvements appurtenant to the Virginia shore. Maryland broke that pattern in 1997 when it attempted to block the Fairfax County Water Authority (the "FCWA") from building a new drinking water intake intended to serve 1.2 million people in Northern Virginia.

Maryland currently requires a permit from any person seeking to withdraw water from the Potomac River or to build an improvement appurtenant to the shore. Md. Code Ann., Envir. §§ 5-502 to 5-504 (1996 & Supp. 2002). Virginia state officials became aware in 1973 that Maryland was applying its permitting system to Virginians using the River. Beginning in 1976, Virginia protested Maryland's authority to do so. *See* Part II(C)(3)-(4), *infra*, at 31-43. Until 1997, however, Maryland had never actually used its permitting system to deny any Virginian access to the River. (Answer ¶ 34; Md. Moot. Mot. at 8; Md. Moot. Reply Br. at 12.)

The FCWA is a local governmental subdivision of the Commonwealth of Virginia. It operates an intake on the Virginia shore of the Potomac River that began withdrawing water in 1982. (VX 197/PVX 248 at 19.) The FCWA obtained a water appropriation permit from Maryland for its shoreline intake in 1974 (MX 843/PMX X, ¶ 20 & MX 862/PMX X-19), and a waterway construction permit in 1977 (MX 1006/PMX Y, ¶ 8 & MX 1012/PMX Y-6). The FCWA received amended water appropriation permits from Maryland in 1982, 1987, 1990 and 1995, each time increasing its permitted withdrawals by 50 million gallons a day. (MX 843/PMX X, ¶¶ 24, 27, 32, 37.) The Potomac River today accounts for approximately half of the FCWA's raw water supply. (VX 197/PVX 248 at 17.)

In 1996, to improve operational efficiency and raw water quality, the FCWA sought to build an offshore water intake extending 725-feet into the channel of the Potomac, at a point where the River is 2000 feet wide. (VX 197/PVX 248 at 16.) A comprehensive history of the project and the permit dispute, covering the period 1996 through 2001, was presented to the Special Master. (L-511 to L-539.) Beginning in May 1997, numerous Maryland state legislators sought to block the project. (*E.g.*, L-341 to L-344; L-367 to L-373; L-515 to L-518; VX 182/PVX 213.) Maryland Senator Jean Roesser, calling a "spade a spade," claimed the project would only "accommodate[] Virginia's massive growth." (L-343.) Maryland Delegate Jean Cryor, in particular, urged Governor Parris N. Glendening and the Maryland Department of Environment ("MDE") to oppose the project, claiming that "Virginia's planners regard the Potomac River as key to their burgeoning development." (VX 182/PVX 213; L-367.) While granting the permit might be "neighborly," Maryland Delegate Adrienne A. Mandel said, it would only harm Maryland's interests by causing more development in Northern Virginia. (L-368.)

On December 10, 1997, MDE formally refused to issue a construction permit, stating that the FCWA's "need" for water "may reasonably be accomplished using the existing intake on the Virginia shore of the Potomac River." (VX 191/PVX 224.) In February 1998, Governor Glendening said that he had decided that the project was not in the "public interest." (L-384.) During her successful 1998 reelection campaign, Delegate Cryor claimed credit for having stopped the project. (L-347, L-382.)

The FCWA appealed MDE's decision on December 23, 1997. (VX 197/PVX 248 at 1.) Although the FCWA repeatedly argued that it was entitled to construct the offshore intake based on the Compact of 1785 and the Black-Jenkins Award of 1877, neither the Maryland Administrative Law Judge (the "ALJ") nor MDE ever addressed its argument. (*See* L-330 to L-331; VX 197/PVX 248 at 88; VX 318/PVX 253 at 21 n.6.) Three years of administrative proceedings and hearings followed,

during which Maryland stipulated that the intake would be safely submerged, that it would have no adverse aesthetic impact, and that it would not harm Potomac River fisheries or interfere with boating. (VX 197/PVX 248 at 15-16.) The ALJ found in January 1999 that MDE had failed to prove that the project would have any adverse environmental impact. (VX 325/PVX 242.) Nonetheless, MDE ruled in June 1999 that it had the power to deny the permit anyway if it determined that the project was not "needed" by the FCWA. (VX 312/PVX 243 at 13, 19.)

In November 1999, Virginia's Attorney General wrote to his Maryland counterpart protesting Maryland's treatment of the FCWA as a violation of Virginia's interstate compact rights – particularly Maryland's requirement that Virginia prove the "necessity" of the project to Maryland's satisfaction. (L-403.) Virginia called upon Maryland either to issue the permit promptly or to acknowledge formally that no permit was required. (*Id.*) The Maryland Attorney General insisted that the permit proceedings had to run their course. (L-405.) Following the introduction of legislation in the Maryland General Assembly to restrict the construction of new intakes in the River, Virginia sought leave to institute this action on February 18, 2000. The Court granted Virginia's motion on March 30, 2000. 530 U.S. 1201 (2000).

On May 10, 2000, the Maryland ALJ issued an opinion finding that MDE had "presented virtually no credible evidence" to support its opposition to the FCWA's project, that ample evidence supported the need for the project, and that MDE's permit denial was "inappropriate." (*See* VX 197/PVX 248 at 45-46.) When the "Final Decision Maker" for MDE adopted the ALJ's recommendations in November 2000 (VX 318/PVX 253), Maryland's Governor vowed to fight on, claiming in a press release that the project would cause "irreparable environmental damage by encouraging [urban] sprawl. . . ." (L-360; *see also* VX 285/PVX 134 ¶ 2.) MDE thereupon appealed its *own* Final Decision Maker's decision to issue the permit. (VX 319/PVX 254.) The Circuit Court for the City of Baltimore dismissed Maryland's appeal

in April 2001, finding that MDE not only lacked standing to challenge its own ruling, but that substantial evidence supported the FCWA's need for the project. (VX 267/PVX 257.)

The construction permit that Maryland finally issued to the FCWA contained "special conditions" mandated by the Maryland General Assembly while this case was pending. (*See* L-526 to L-532; L-536 to L-537; VX 318/PVX 253 at 19-20; L-337 (Sp. Cond. 1(e)).) Two versions of the "Potomac River Protection Act" had passed – one sponsored by Delegate Cryor that would have prohibited an intake pipe of the size desired by the FCWA, the other by Senator Christopher Van Hollen that allowed the FCWA to build the pipe to the desired size, but only if it included a permanent flow-restrictor limiting the quantity of water to the amount authorized under the FCWA's water appropriation permit. (L-529 to L-530.) Senator Van Hollen had loosened the restrictions in his original bill in response to Virginia's suit against Maryland:

> The primary purpose of the amendment, [Van Hollen] said, is to strengthen the hand of Maryland environmental officials in negotiations with Virginia. The original bill would have prevented the state from granting Virginia's permit and settling the lawsuit before it reaches the U.S. Supreme Court. "I don't think Maryland wants to roll the dice on control over the Potomac River. . . ."

(L-356.) Delegate Cryor and the Secretary of the MDE agreed with Senator Van Hollen that Governor Glendening should sign his bill instead of Cryor's version, so as not to jeopardize Maryland's litigation position here. (*See* L-413.) Nonetheless, Van Hollen explained the importance of the required flow-restrictor: "We don't want Virginia to willy-nilly withdraw large amounts out of the Potomac to fuel development on its side. . . . We'd have the key to physically adjust it." (L-360 to L-361.)

C. The Special Master's Recommendations and Maryland's Exceptions.

The parties litigated four major issues before the Special Master. First, the Special Master rejected Maryland's argument that the case became moot once Maryland declined any further appeals of the decision to issue the permit to the FCWA. (S.M. App. F-3 to F-9.) Second, the Special Master found that the rights conferred in Article Seventh of the Compact of 1785 apply to the entire Potomac River, including the non-tidal portion where the FCWA's offshore intake is located (the "Entire River Issue"). (Report at 14, 72-73.) Third, the Special Master rejected Maryland's argument that it should have implied police power authority to regulate Virginia's access to the Potomac, even if such authority is not found in Article Seventh of the Compact of 1785 or Article Fourth of the Black-Jenkins Award (the "Regulation Issue"). (Report at 73.) Finally, the Special Master found that Maryland had failed to prove that Virginia lost its right of unrestricted access to the Potomac by having acquiesced in Maryland's prior issuance of permits to Virginia users (the "Acquiescence Issue"). (Report at 77-96.)

Maryland takes exception only to the last two of the Special Master's conclusions.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY FOUND THAT VIRGINIA'S COMPACT RIGHTS ENTITLE IT TO WITHDRAW WATER FROM THE POTOMAC RIVER AND TO BUILD IMPROVEMENTS APPURTENANT TO THE VIRGINIA SHORE WITHOUT OBTAINING MARYLAND'S PRIOR PERMISSION.

Maryland's first exception rests on three premises: (1) neither the Compact of 1785 nor the Black-Jenkins Award of 1877 denied Maryland the authority to regulate the terms of Virginia's access to the Potomac River; (2) Maryland was the undisputed owner of the entire Potomac River in 1785; and (3) applying the "unmistakability doctrine," *United States v. Winstar Corp.*, 518 U.S. 839, 871 (1996), Maryland impliedly retains the authority to regulate Virginia's Potomac River

access rights, even if that authority is not expressly found in the Compact or the Award. Each step in Maryland's argument is wrong.

A. The 1785 Compact and the 1877 Award Confirmed Virginia's Right to Use the Potomac River and to Build Improvements Appurtenant to the Virginia Shore Without Maryland's Permission.

"A compact is a contract. It represents a bargained-for exchange between its signatories and 'remains a legal document that must be construed and applied in accordance with its terms.'" *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part) (*quoting Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). A congressionally approved compact is also "a statute." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). "Just as if a court were addressing a federal statute, then, the '*first and last order of business*' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (*quoting Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983)) (emphasis added).

Maryland's argument that Virginia must have its permission in order to use the Potomac River is defeated by the plain language of Article Seventh of the Compact of 1785 and Article Fourth of the Award. Article Seventh guaranteed equally to the "citizens of each state respectively . . . full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. . . ." (S.M. App. B-3.) The right of fishing was likewise to be "common to, and equally enjoyed by, the citizens of both states. . . ." (*Id.*) This language is plain and unambiguous and is not qualified by any authority on the part of either State to require permits as a condition of access by the citizens of the other State.

Maryland argues that Article Seventh was only a one-way grant of riparian rights by Maryland to Virginia citizens,

thereby silently reserving Maryland's implied right to regulate the terms of their access. Although Maryland's assumption that its ownership of the River was "well-settled" in 1785 is demonstrably wrong, *see infra* at 19-21, there is also nothing in the text of Article Seventh to support Maryland's argument. Unlike Article First of the Compact, by which *Virginia* forever disclaimed the right to impose tolls on Maryland vessels passing between the Capes of Chesapeake Bay – where Virginia's title was clear (S.M. App. B-1 to B-2) – Article Seventh recognized "common" rights and mutual grants in the Potomac River – where the boundary was unsettled. While Article Seventh left each State free to control its *own* citizens' activities on its own shore, it gave neither State the power to control the construction of improvements or the withdrawal of water by citizens of the *other* State. Indeed, the Compact carefully addressed situations where one State's regulatory authority would touch the other State's citizens. Article Fourth provided for certain vessels to "enter and trade in any part of either state, with *a permit* from the naval-officer of the district from which such vessel departs with her cargo. . . ." (*Id.* B-2 (emphasis added).) Article Eighth required legislation to be approved by *both* Virginia and Maryland before either State could regulate fishing or navigation in the River. (*Id.* B-3.) Article Tenth provided that offenses committed on the River would be prosecuted by the State in which the offender was a citizen, or by the State in which the victim was a citizen if the offender were a citizen of neither. (*Id.* B-4 to B-5.) Article Eleventh provided for process of either State to be served anywhere on the River, but *not* on citizens of the other State. (*Id.* at B-6 to B-7.) Had the drafters intended in Article Seventh for Maryland to have the authority to control the terms of Virginia's water withdrawals or its construction of wharves and other improvements, they certainly would have said so, particularly since their purpose was to "settle the jurisdiction" over the River. (S.M. App. B-1.)

Virginia's rights as a *sovereign* under Article Seventh of the Compact of 1785 were further confirmed by Article Fourth of the Black-Jenkins Award, which provided that:

> *Virginia* is entitled not only to the full dominion over the soil to low-water mark on the south shore

> of the Potomac, but has a *right* to such use of the river *beyond the line of low-water mark* as may be necessary to the full enjoyment of *her* riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, *agreeably to the compact of seventeen hundred and eighty-five*. (*Id.* C-4 (emphasis added).)

The italicized language emphasizes that Virginia's rights as a sovereign under Article Seventh of the Compact of 1785 were recognized and protected. The arbitrators also pointed out in their opinion that Virginia had expressly reserved its right to use the River and to build improvements from the shore both in its Constitution and in the Compact of 1785, and that Maryland had "assented to this" by agreeing to Article Seventh of the Compact. (*Id.* D-18.) Article Fourth of the Award is plain and unambiguous, and free of any inference that Maryland can somehow require permits as a condition of Virginia's exercising its *right* to use the River.

Where an interstate compact is clear and unambiguous, like Article Seventh of the 1785 Compact and Article Fourth of the 1877 Award, "that language is conclusive and no evidence extrinsic to the Compact needs consideration." (Report at 15 (collecting cases).) For the sake of completeness, however, it is noteworthy that Maryland's present interpretation of the Compact is contradicted by its own "[e]arly and long-continued" practical construction. *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576 (1930). In the early years following the Compact of 1785, Maryland authorized the Commissioners of the District of Columbia to issue permits for piers in the City of Washington extending into the River from the *Maryland side*, but that authority did not encompass piers on the *Virginia side*. (Report at 70-71; L-545 to L-549.) Virginia, not Maryland, regulated the vessels, docks and wharves extending into the River in the Town of Alexandria. 1798 Va. Acts. ch. 60, § 6, 2 Va. Stat. 122, 123 (1835) (L-159). Similarly, Virginia, not Maryland, regulated the numerous ferries that crossed the Potomac River between the two States. *E.g.*, 2 Va. Code ch. 237, § 8 (1819) (L-162 to L-164; *see also* L-684 n.185).

Maryland's interpretation of the 1785 Compact at the time of the Black-Jenkins Award also confirms beyond any doubt that Maryland lacks the authority to regulate Virginia's construction of improvements extending into the Potomac River. In their 1873 report to Maryland Governor Whyte, the Maryland Commissioners, led by Isaac D. Jones, advised that the boundary should be drawn in a way that protected Virginia's existing and future improvements in the River:

> following the said river, at low water-mark, to all wharves and other improvements now extending, or which may *hereafter* be extended, *by authority of Virginia*, from the said shore into the said river beyond low water-mark, and following the said river *around* said wharves and improvements to low water-mark on the southeastern side thereof. . . .

Maryland Boundary Commissioners' Report, *supra*, at 42, 53, 140 (emphasis added) (L-22, L-27, L-70). The Maryland Commissioners explained:

> The line along the Potomac River is described in our first proposition according to *our construction* of the compact of 1785, and as we are informed, is according to the *general understanding of the citizens of both States* residing upon or owning lands bordering on the shores of that river, and also *in accordance with the actual claim and exercise of jurisdiction by the authorities of the two States hitherto.*

Id. at 27 (emphasis added) (L-14). The Maryland Commissioners believed that their position was also consistent with Virginia's Constitution of 1776, which they interpreted as reserving to Virginia "such improvements beyond that mark as *Virginia might deem proper to authorize.*" *Id.* at 125 (emphasis added) (L-62); *see also id.* at 41 ("It is admitted, that the exception from the quit-claim in the Virginia Constitution of 1776 . . . to which Maryland agreed in the compact of 1785, modified to some extent, the limits contained in the Maryland charter.") (L-21). During the arbitration proceedings the

following year, Maryland's counsel (at that point former Governor Whyte and former commissioner Jones) invoked the same boundary description – going around any improvements to be constructed *"by authority of Virginia"* – as *"what the State of Maryland considers that 'true line'* to be. . . ." (L-130 (emphasis added).)

Maryland thus acknowledged that Virginia enjoyed complete authority to decide when and whether to extend any improvements into the Potomac River – "by authority of Virginia." (*Id.*) Maryland's view was based on its *own* construction of the Compact of 1785 and the Virginia Constitution of 1776, on the "general understanding of the citizens of both States," and on "the actual claim and exercise of jurisdiction by the authorities of the two States hitherto." (L-14.) As the Special Master recognized, Maryland's position in 1873 is "simply impossible to harmonize with the notion that nearly a century before all parties would have understood that Maryland had the power to regulate the Compact rights of both Marylanders and Virginians." (Report at 52.)

Maryland argues, nonetheless, that "boundary means sovereignty," so that the arbitrators – by fixing the boundary on the Virginia side at low-water mark – implicitly gave Maryland the authority to regulate Virginia's construction of improvements extending beyond the boundary line. (Md. Exc. at 23.) But Maryland ignores the text of Article Fourth of the same Award that set the line, which explicitly gave Virginia the *right* to use the River *beyond the line of low-water mark* without requiring Maryland's prior permission. Maryland also ignores that each State had agreed in 1874, as a condition of submitting the boundary dispute to arbitration, that

> *neither of the States*, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in [the Compact of 1785], but that the same shall remain to and be enjoyed by the said *States* and the citizens thereof, forever.

1874 Md. Laws ch. 247 § 1 (emphasis added) (L-171); 1874 Va. Acts ch. 135 § 1 (similar language) (L-169). The arbitrators

understood that the Compact was regarded "as of such sacred obligation that all power to touch it is withheld from us. . . ." (S.M. App. D-13.) Because the 1874 legislation specifically reserved each State's prior rights and authority, Virginia's rights of access remained the same as they were prior to the Award, "agreeably to the compact of [1785]." (*Id.* C-5.) As we have seen, Maryland acknowledged prior to the Award that Virginia enjoyed the right to decide for herself when and whether to build improvements in the River. The Black-Jenkins Award did not change that.

Maryland's early construction of Virginia's rights is further confirmed not only by the fact that Maryland sought no authority to regulate West Virginia's Potomac River rights in *Maryland v. West Virginia*, 217 U.S. 577, 580-81 (1910) (*see* Report at 65-66); but also by the fact that Maryland did not apply its permitting system to any Virginian until 1957, at the earliest. (Tr. (4/24/02) at 33.) The 172 years following the Compact of 1785 – during which Maryland never asserted the right to regulate Virginia's access – is much more probative of the meaning of the Compact and the Award than Maryland's comparatively recent efforts to require Virginians to obtain permits as a condition of using the River. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 130-32 (1983) (rejecting an interpretation adopted 60 years after the Clayton Act in favor of the Government's earlier construction); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (rejecting interpretation adopted 24 years later as "neither contemporaneous . . . nor consistent").

B. Maryland Incorrectly Claims that Its Ownership of the Potomac River Was "Well-Settled" in 1785.

Maryland's argument that it silently retained the authority to regulate Virginia's Potomac River access also depends on a crucial historical premise – that Maryland's sovereign authority over the Potomac River was "well-settled" at the time it formed the Compact of 1785 with Virginia. (Md. Exc. at 19.) Maryland bases that premise on decisions rendered in *1899* and later, which found that the 1632 Charter to Lord Baltimore included the entire Potomac River and took precedence over the later patents for the Northern Neck.

See Morris v. United States, 174 U.S. 196, 224-25 (1899); *Maryland v. West Virginia*, 217 U.S. 1, 45-46 (1910); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 63 (1921).

It is elementary that Maryland cannot rely on decisions rendered more than a century after the Compact of 1785 in order to prove that Maryland's territorial boundaries were "well-settled" in 1785. *See Vermont v. New Hampshire*, 289 U.S. 593, 604 (1933) ("Obviously the meaning of the words of the order could not be established by a rule of law declared long after its promulgation. . . ."). Maryland compounds that mistake by ignoring the Court's acknowledgment in *Morris* and *Marine Railway* that the boundary in the Potomac River *remained contested* for many years, until it was finally settled by the Black-Jenkins Award. *Morris*, 174 U.S. at 224 (stating that the controversy was "still continuing" prior to 1877); *Marine Ry.*, 257 U.S. at 63-64 (stating that the Compact of 1785 "left the question of boundary open to long continued disputes").

Black and Jenkins had ample basis when they observed in 1877 that the "State of Virginia, through her Commissioners and other public authorities, adhered *for many years* to her claim for a boundary on the left bank of the Potomac." (S.M. App. D-7 (emphasis added).) Maryland glosses over that history entirely. *See supra* at 2-7. Indeed, Maryland's contrary historical account here completely contradicts what its own highest court said in 1946, and what its own Attorney General told this Court in 1894. *See Barnes v. Maryland*, 47 A.2d 50, 52-53 (Md. 1946) ("Virginia did not yield up her claim to the rest of the river until the boundary settlement in 1877. . . . It was not until 1877, therefore, that the Potomac River boundary between the two states was finally settled."); Appellant's Brief at 23-24, *Wharton v. Wise*, 153 U.S. 155 (1894) ("[T]he boundary between the two States was unsettled and in dispute [in 1785], and the claims of the State [sic] were widely divergent.") (VX 264/PVX 61).

In short, Maryland's assumption that the boundary was somehow "well-settled" in 1785 — which serves as the "underlying premise of Maryland's argument" (Report at 47)

– is simply wrong. Had Maryland's ownership been undisputed, there would have been no need to "settle the jurisdiction" of the Potomac River in the Compact of 1785 (S.M. App. B-1), and no need to fix the boundary nearly a century later.

C. Maryland Law Cannot Determine Virginia's Rights in the Potomac River.

Maryland's third premise – that ownership of the River would entitle Maryland to apply its own laws to control Virginia's rights – fails, independently, for two separate reasons.

1. Federal Common Law, Not Maryland Law, Would Govern Virginia's Rights in the Absence of a Compact.

Even if there were no interstate compact confirming Virginia's right to use the Potomac River, and even if Maryland's ownership of the Potomac River to the Virginia shore had never been in doubt, Maryland would still not be entitled to apply its own laws to control Virginia's rights of access. Federal common law, not state law, applies "[w]hen we deal with air and water in their ambient or interstate aspects. . . ." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *see Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *Vermont v. New York*, 417 U.S. 270, 277 (1974); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Disputes of this sort between States are governed by a "cardinal rule" – "that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *see also Texas v. New Mexico*, 462 U.S. 554, 569 n.15 (1983) ("[O]ne answer is clear: no one State can control the power to feed or to starve, possessed by a river flowing through several States.") (*quoting* Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L. J. 685, 701 (1925)); *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931) ("Both states have real and substantial interests in the

River that must be reconciled as best they may be."); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) ("The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other."). Even where a river flows *entirely* through one State, mere ownership of the riverbed does not entitle that State to divert the river for its own use without regard to the interests of downstream States. *E.g., New Jersey v. New York*, 283 U.S. at 342; *Colorado v. New Mexico*, 467 U.S. 310, 317-23 (1984); *Colorado v. New Mexico*, 459 U.S. 176, 181 n.8 (1982); *Hinderlider*, 304 U.S. at 102-03; *Wyoming v. Colorado*, 259 U.S. at 466. "[A] State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983); *cf. Sporhase v. Nebraska*, 458 U.S. 941, 955 (1982) (recognizing Nebraska's interest in regulating its own citizens' groundwater withdrawals).

Federal common law preempts all state law, whether statutory or judge-made. *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *Hinderlider*, 304 U.S. at 110 ("[N]either the statutes nor the decisions of either State can be conclusive."). Accordingly, Maryland's legal assumption is fundamentally wrong. Maryland would not be free to apply its own permitting laws to control Virginia's use of the Potomac River even assuming: (i) the absence of an interstate compact specifically protecting Virginia's rights of access; and (ii) the fiction that the boundary has always been "well-settled." As the Court of Appeals for the Seventh Circuit put it, "[e]ach of these states has an interest in the use of the river, but the laws of one state cannot control the use of the river by citizens of other states." *Illinois v. Milwaukee*, 731 F.2d 403, 408 (7th Cir. 1984) (citation omitted).

2. The "Unmistakability Doctrine" is Inapplicable.

Maryland also fundamentally misapplies the "unmistakability doctrine," a canon of contract construction that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). The Court thoroughly discussed this doctrine in *United States*

v. Winstar Corp. *See* 518 U.S. 839, 871-87 (1996) (plurality opinion by Souter, J.); *id.* at 910-18 (Breyer, J., concurring); *id.* at 920-22 (Scalia, J., concurring); *id.* at 924-31 (Rehnquist, C.J., dissenting). The canon originates from the "theory of parliamentary sovereignty, made familiar by Blackstone," that one legislature may not impair the legislative authority of a succeeding legislature because the two are of equal dignity. *Id.* at 872; *see, e.g., Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 459 (1892) ("[T]he latter have the same power of repeal and modification which the former has of enactment. . . ."). But on "this side of the Atlantic," a subsequent legislature may not undo the work of a predecessor if that would violate the Constitution. *Winstar*, 518 U.S. at 873. The unmistakability doctrine was originally developed in cases decided under the Contract Clause involving private parties' contracts with state or local governments. *Id.* at 875. Later decisions extended the doctrine "from its Contract Clause origins dealing with state grants and contracts to those of other governmental sovereigns, including the United States." *Id.* (*citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

The doctrine is "simply a rule of presumed (or implied-in-fact) intent." *Id.* at 920 (Scalia, J., concurring). Its proper application depends on the relationship of the sovereign to the other party to the contract. *Id.* at 875. The rule makes perfect sense in the context of a private citizen contracting with a State government, or a State or tribe contracting with the federal government. A private citizen could not reasonably assume that the government intends to relinquish its future sovereign powers, nor could a State or tribe assume that the federal government intends to relinquish its dominant navigational servitude, "unless the opposite clearly appears." *Id.* at 920-21 (emphasis altered).

But this is *not* a case between a State and one of its citizens, *e.g., Illinois Central R.R. Co.*, 146 U.S. at 459, or between the federal government and a *lesser* sovereign, *e.g., United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *Montana v. United States*, 450 U.S. 544, 552-53 (1981). Virginia and Maryland were *co-equal* sovereigns when they entered into the

Compact of 1785, at a time when their boundary was disputed. They specifically preserved their Compact rights, as a condition of submitting the boundary dispute to arbitration, without knowing where the boundary would be fixed. The premise of the unmistakability doctrine – that one party is junior to a superior sovereign – simply does not apply here. The Special Master explained it this way:

> Here, where an arbitration between equal sovereign States at last decides the location of a boundary and simultaneously confirms pre-existing rights in one of those States, *it would be anomalous to conclude that the rights of that sovereign State and its citizens are subject to regulation by the other co-equal sovereign without the slightest suggestion of that fact.* (Report at 57 (emphasis added).)

Understanding the history of the States' previous boundary dispute is critical. *See Ohio v. Kentucky*, 444 U.S. 335, 337 (1980) (discussing the importance of "historical factors" in fixing the boundary at the low-water mark on the northerly side of the Ohio River as it existed in 1792). Focusing on what the States knew at the time of the Compact of 1785, the Special Master correctly concluded that "[a]ny notion that Maryland had . . . an overriding 'police power' to impose further regulation upon the express rights vested in Virginia under Article Seventh would certainly have been abhorrent to the Virginia Commissioners and legislators and at least foreign to the Maryland Commissioners and legislators." (Report at 46.)

In this respect, the Compact of 1785 was not at all like the 1786 Treaty of Hartford, in which Massachusetts agreed that New York would forever enjoy exclusive "rights as a sovereign state in the granted territory. . . ." *Massachusetts v. New York*, 271 U.S. 65, 87 (1926). Those rights necessarily included ownership of submerged lands in the navigable waters of Lake Ontario. *Id.* at 88-90. The Compact of 1785 was also different from the Compact of 1834 between New Jersey and New York, which settled the "territorial limits" of the two states. *Central R.R. Co. of New Jersey v. Mayor of New Jersey*, 209 U.S. 473, 477 (1908). The Court found it "plain on the face of the agreement"

that New Jersey retained sovereignty to impose taxes on lands located on its side of the boundary. *Id.* at 478-79. Unlike the parties to those compacts, the parties to the Compact of 1785 knew that the boundary was disputed and that they were not resolving that controversy. To the extent they negotiated the Compact "with reference to principles of law existing at the time the contract was made," *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part), they would have understood that *neither* State could unilaterally impose its own laws on the other. *See* T. Rutherforth, *Institutes of Natural Law*, Book II, Ch. 9, § 7, at 491 (1754, 2d Amer. ed. 1832) ("Where a question arises between two nations about the extent of their respective territories; that is, about their respective right to this or that tract of land; *the civil law of either nation cannot be the proper measure*, by which the controversy is to be determined. . . .") (emphasis added).[7]

Furthermore, notwithstanding the premise of the unmistakability doctrine – that a subsequent legislature has the same authority to repeal laws as its predecessor had to enact them – a State cannot undo the work of a prior legislature if to do so would violate the Constitution. *Winstar*, 518 U.S. at 873; *Mugler v. Kansas*, 123 U.S. 623, 663 (1887); *New Orleans Gas-Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co*, 115 U.S. 650, 661 (1885). The Compact Clause, Art. I, § 10, cl. 3, clearly prevents a party to an interstate compact from later backing out of the deal. Indeed, "since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced *despite* otherwise valid state restrictions on state action." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 34 (1951) (Reed, J., concurring) (emphasis added); *United States v. Bekins*, 304 U.S. 27, 52 (1938) ("The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 88-89 (1823) ("Can the

7. Rutherforth's treatise was well known to the founding generation, including Samuel Chase (one of Maryland's commissioners to the Mount Vernon Conference). *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230-31 (1796) (Chase, J.).

government of Kentucky fly from this agreement . . . because it involves a principle which might be inconvenient, or even pernicious to the State, in some other respect? The court cannot perceive how this proposition could be maintained.").

That a compact may be deemed "in derogation of the sovereignty of the state" is completely irrelevant if the "agreement, properly construed, so provides. The fundamental question is, What does the contract mean?" *Virginia v. West Virginia*, 238 U.S. 202, 234 (1915). The Special Master correctly answered that question: Article Seventh of the Compact and Article Fourth of the Award gave Virginia the right to use the Potomac River without having to obtain Maryland's permission. (Report at 45-46, 57.)

D. Maryland's Claimed Regulatory Authority Cannot be Reconciled with Virginia's Rights of Access.

Maryland's handling of the FCWA's offshore intake project demonstrates that its assertion of regulatory authority would render meaningless Virginia's *right* to use the River. Even after the Maryland ALJ ruled that the construction and operation of the project would have no adverse environmental impact (VX 325/PVX 242 at 7-10), Maryland continued its refusal to approve the project, asserting that it had the right to determine whether the FCWA "needed" an offshore intake (VX 312/PVX 243 at 13, 19). Maryland gave no deference whatsoever to the FCWA's own judgment, or to the finding by the Virginia Department of Health that the project was an "essential public health initiative" for more than a million people in Northern Virginia. (L-379.) While the FCWA ultimately proved the "need" for the project to the satisfaction of the Maryland ALJ (VX 197/PVX 248 at, *e.g.*, 45), to MDE's "Final Decision Maker" (VX 318/PVX 253 at 7-13, 17-18), and to a Maryland state judge (VX 267/PVX 257 at 17-21), its victory came only after four years of litigation, hundreds of thousands of dollars in litigation costs, and millions of dollars in annual water treatment costs unnecessarily wasted while Maryland obstructed Virginia's rights of access to the River. (L-331.)

In the meantime, Maryland's Governor took credit for blocking the project (L-384), complaining that it would contribute to urban "sprawl" in Virginia (L-360). The Maryland General Assembly also joined the fray, requiring a flow-restrictor for the express purpose of controlling Virginia's development. (L-355 to L-356, L-360 to L-361.) Maryland's attempt to determine what was purportedly in Virginia's best interest created both "the appearance" and the "reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

Maryland continued its regulatory overreach in 2002, when it asserted the authority to make Virginia *pay* for water withdrawn from the Potomac River. Maryland's Governor introduced legislation allowing MDE to require all permitees to pay for their water withdrawals. (VX 125/PVX 330; VX 126/PVX 331.) Maryland's Secretary of the Environment defended the decision to apply the legislation to Virginia on the ground that Maryland would impose such fees equally on Virginia and Maryland users. (VX 278/PVX 334.) After the Virginia Attorney General protested the plan as a clear violation of Virginia's compact rights (VX 204/PVX 332), and after media reports questioned whether this new legislation would undermine Maryland's case here (VX 225/PVX 333), the Governor's proposal was not reported out of committee (VX 127/PVX 335).

Maryland's legislative efforts, and the FCWA's own recent experience, are a barometer of things to come. Virginia's *right* of access to the Potomac River is rendered meaningless if Maryland can decide for itself whether Virginia "needs" such access, if Maryland can use its putative control over the River to restrict Virginia's development, or if Maryland can make Virginia pay for the privilege of using the River when the Court is no longer watching.

II. THE SPECIAL MASTER CORRECTLY REJECTED MARYLAND'S AFFIRMATIVE DEFENSE OF PRESCRIPTION AND ACQUIESCENCE.

A. A State Cannot Lose a Compact Right by Prescription and Acquiescence.

The Special Master properly questioned whether "the doctrine of acquiescence could apply to the unique situation presented here. . . ." (Report at 81.) The Court has never held that a State can lose a federally-approved interstate compact right by acquiescing in another State's prescriptive acts. Indeed, the Court permitted Texas to recover for New Mexico's breach of the Pecos River Compact during an earlier, 33-year period (1950-1983), stating: "There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The same is true here.

When Congress approved the Black-Jenkins Award and, thereby, the original Compact of 1785, *Wharton*, 153 U.S. at 173, Virginia's compact rights were transformed into federal law binding on the signatory states under the Supremacy Clause. *E.g., New Jersey v. New York*, 523 U.S. 767, 810-11 (1998); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Just as no State can alter a federal law, no State can alter a federally-approved compact. As the Court put it in *New Jersey v. New York*, "'unless the compact to which Congress has consented is somehow unconstitutional,' no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." 523 U.S. at 811 (*quoting Texas v. New Mexico*, 462 U.S. at 564). Because prescription is merely an equitable doctrine, *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973), it cannot be invoked by Maryland to deprive Virginia of its federally-approved compact rights.

B. Even if Applicable, the Doctrine Should Require Proof by Clear and Convincing Evidence.

Assuming that one State can be deprived of a federally-approved compact right by another State's prescriptive acts, the extraordinary nature of such a dispossession should require extraordinary proof: clear and convincing evidence. The Court in *New Jersey v. New York* emphasized how heavy the burden should be in the traditional context of a boundary dispute: "It is essential to appreciate the extent of this burden that a claimant by prescription must shoulder." 523 U.S. at 787 (Opinion by Souter, J.). Justice Breyer called it a "high barrier," *id.* at 814 (Breyer, J., concurring), and Justice Scalia a "very high burden of proof," *id.* at 829 (Scalia, J., dissenting). A "clear and convincing" standard best reflects these sentiments, particularly when the defense is invoked to defeat an interstate compact right that Maryland repeatedly promised would last forever. (S.M. App. B-7 to B-8; L-180.)

Virginia acknowledges this Court's reference to the "preponderance" standard in *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991). However, the Special Master in that case cited no legal authority for the lower standard, Report of Special Master at 11-12, *Illinois v. Kentucky*, No. 106, Orig. (July 5, 1990), neither of the parties questioned it, and the point was moot because Kentucky failed to carry its burden anyway. Similarly, the Court in *New Jersey v. New York* cited the "preponderance" language from *Illinois*, *see* 523 U.S. at 787, but the issue was again moot because New York also failed to carry its burden. *Id.* at 790. The Special Master here likewise did not reach that question because the evidence did not "come close to making the necessary showing." (Report at 81.)

While federal law governs this question, the Court should consider that state common law, including the law in both Virginia and Maryland, requires a party to prove by "clear and unequivocal" evidence that an easement has been lost through prescription and abandonment. *See Pizzarelle v. Dempsey*, 526 S.E.2d 260, 264 (Va. 2000); *Shuggars v. Brake*, 234 A.2d 752, 758 (Md. 1967); 23 Am. Jur. 2d *Easements and Licenses* § 112 (1996). It would be anomalous to require a lesser standard

to establish a sovereign's loss of an interstate compact right than to prove a citizen's loss of a mere private easement.

C. Maryland's Evidence is Inadequate Even Under a "Preponderance of the Evidence" Standard.

1. The Only Relevant Evidence Concerns Water Withdrawal and Waterway Construction.

Most of Maryland's evidence has nothing whatsoever to do with Virginia's right to withdraw water from the Potomac River or to build improvements appurtenant to the Virginia shore. The Special Master correctly found that evidence that Maryland has regulated entirely *different* activities on its side of the boundary – such as liquor sales, lotteries and gambling – fails to demonstrate in any way that Virginia has lost the two specific rights at issue here. (*See* Report at 78-81.) Similarly, none of the Virginia Attorney General Opinions cited by Maryland (Md. Exc. at 38) speaks to whether Maryland can control Virginia's rights to withdraw water and build improvements. The one most nearly on point reaffirmed the rights of Virginians to construct improvements from the shore. 1948-49 Va. Att'y Gen. Rep. 118 (Md. App. 30).

2. Virginia Taxes More Than 99% of the Structures Extending Beyond the Boundary.

Maryland cites taxation as "one of the primary indicia of sovereignty" (Md. Exc. at 34-35 (quoting *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991)), supporting its regulation of Virginia's access to the River. However, there are at least 338 structures extending from the Virginia shore beyond the boundary line (including piers, docks and boat ramps) that are taxed *exclusively* by Virginia localities, *not* Maryland. (*See* VX 283/PVX 132, ¶¶ 2-3 (25 in Stafford County); VX 276/PVX 127, ¶¶ 2-3 (204 in Westmoreland County); VX 287/PVX 135, ¶¶ 2-3 (59 in Northumberland County); VX 282/PVX 131, ¶¶ 2-3 (50 in King George County).)

By contrast, Maryland imposes real estate taxes on only *three* establishments reached by piers from the Virginia shore: "Jamaica Joe's" (MX 601/PMX F, ¶ 8; MX 836/PMX G, ¶ 4);

"Flanagan's" (MX 601/PMX F, ¶ 15); and "Coles Point" (MX 1041/PMX H, ¶ 3). Westmoreland County, Virginia, taxes the piers leading to Flanagan's and Coles Point, but not the restaurants. (VX 276/PVX 127, ¶ 4.) King George County, Virginia, taxes neither the restaurant nor the pier at Jamaica Joe's. (VX 282/PVX 131, ¶ 3.) As Maryland points out, these establishments experienced their heyday between 1949 and 1958, when slot machines were legal in Maryland but illegal in Virginia. (MX 913/PMX W, ¶¶ 3-23; MX 617/PMX C, ¶ 8.) To protect their gambling businesses, the proprietors went to extraordinary lengths to show that their operations were *not* in Virginia. They recorded the deeds for the properties in Maryland. (MX 913/PMX W, ¶¶ 24-32 & Exs. 17-24.) At least two of the proprietors cut gaps in their piers to show that the property was not in Virginia. (MX 913/PMX W, ¶ 42 & Ex. 33; MX 949/PMX S, ¶ 3.) Another placed a large sign at the boundary line to show that the customer was entering the State of Maryland. (MX 616/PMX N, ¶ 3.)

Maryland produced no evidence that any of these restaurants was built pursuant to a Maryland waterway construction permit, so the relevance of its taxation of these structures is questionable. Nonetheless, to the extent that the States' respective taxation of shoreline improvements is relevant to Virginia's right to build such structures in the first place, the evidence thoroughly undercuts Maryland's case, just as it undercut Kentucky's prescriptive claim in *Illinois v. Kentucky*. Kentucky taxed only three of the 15 structures that extended from the Illinois shore of the Ohio River. 500 U.S. at 385. Maryland fares much worse by comparison – taxing only three out of approximately 340 structures. Maryland's claim must likewise fail.

3. Maryland Failed to Prove Virginia's Knowledge of Maryland's Permitting System Prior to 1973.

To prove its affirmative defense, Maryland must show that its prescriptive acts were *known* to the Commonwealth of Virginia and that Virginia failed to protest for a period that is sufficiently protracted to establish acquiescence. *New Jersey v. New York*, 523 U.S. at 787, 807. Officials from the Virginia State

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Water Control Board ("SWCB") certainly knew in August 1973 that Maryland was requiring the FCWA to obtain a permit to withdraw water from the Potomac River at the Virginia shoreline. The SWCB sent a letter to Maryland's Water Resources Administration supporting the issuance of the permit. (MX 897/PMX X-54.) Maryland relies on this letter, and other documents from 1973, to claim that Virginia "actively participated" in Maryland's permitting process. (Md. Exc. at 43 (*citing* Md. App. 208-10, 216).)

Maryland offered no evidence, however, to prove that Virginia state officials knew prior to 1973 that Maryland claimed that its permitting laws were binding on Virginia. Although Maryland enacted its permitting system in 1933, the legislation did not mention the Potomac River. 1933 Md. Laws ch. 526, §§ 4, 5 (VX 69/PVX 318). Maryland did not enact a specific statute requiring permits for waterway construction in the Potomac River until 1957. 1957 Md. Laws ch. 757 (VX 74/PVX 321). Even then, neither the original 1933 legislation nor the 1957 statute applied to Virginia, its municipalities or citizens. These laws required a permit to be obtained only by "*the State* [of Maryland] or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political subdivision *of the State*. . . ." Md. Code Ann., Art. 66C, §§ 720-722 (Michie 1957) (emphasis added) (L-184 to L-186). It was not until 1973 that these statutes dropped the bracketing term "the State" and broadened their reach to any "person" seeking to withdraw water or to engage in waterway construction. *See* 1973 Md. Laws ch. 4, §§ 8-802(A), 8-803(A), 8-804 (VX 87/PVX 323). The amendment itself did not give Virginia even constructive notice that Maryland's permitting laws now applied to Virginia users. A State is generally not required to "scrutinize the discourse of those in [another State] even if in statutory form." *Marine Ry.*, 257 U.S. at 65.

As of 1973, moreover, two northern Virginia localities had been using Potomac River water for decades without a permit from Maryland. Arlington County, since 1927, and the City of Falls Church, since 1947, have received their water from the

Washington Aqueduct Division of the Army Corps of Engineers (the "Aqueduct"). *See generally* Harry C. Ways, *The Washington Aqueduct, 1852-1992*, at 105, 129-30 (1992) (VX 259/PVX 281). (*See also* L-478). The Aqueduct, which also supplies water to the District of Columbia, has withdrawn its raw water at the Maryland shore of the Potomac River since 1859. Ways, *supra*, at 29. Maryland concedes that it has *never* required a permit for any of the Aqueduct's withdrawals, including water supplied to these two Virginia localities. (L-423 to L-424; L-553.)

Moreover, when the States were last before this Court in 1957, after Maryland had attempted to abrogate the Compact of 1785, Maryland never asserted that it could regulate Virginia's right to withdraw water or to build improvements appurtenant to the Virginia shore. Even though the 1957 controversy did not involve these rights, Article VII, Section 1 of the new compact specifically preserved them:

> The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact. . . . (S.M. App. E-23-24.)

The Commissioners' joint report explained that Article Seventh of the Compact of 1785 was "reflected" in this provision, which "carries forward certain rights of the citizens of Maryland and Virginia which have *not been in controversy*." (*Id.* E-8 (emphasis added).)[8]

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8. Maryland misplaces its reliance on the Preamble to the 1958 Compact, which stated that Maryland is "the owner of the Potomac River bed and waters" to the low-water mark on the Virginia shore, while Virginia owns the "bed and waters southerly from said low water mark. . . ." (S.M. App. E-10.) That was simply an abbreviated description of the 1877 boundary determination, not a hidden message that the parties had agreed that Maryland was now entitled to regulate Virginia's water withdrawals or waterway construction. Maryland's interpretation would contradict both the Commissioners' report and the savings provision in Article VII, § 1.

It turns out that Maryland issued its first water appropriation permit to a Virginia locality – Fairfax County – in March 1957 (MX 850/PMX X-7), but there is no evidence that Virginia state officials knew about it. The permit was allowed to lapse in 1964 when no construction plans had materialized. (L-614.) In 1968, Maryland issued a water appropriation permit to the Town of Leesburg, Virginia. (MX 860/PMX X-17.) It is unclear in retrospect why Fairfax County or Leesburg applied for a permit. Even if the Maryland law had applied to Virginia users at the time, it required no permit for "the use of water for an approved water supply of any municipality. . . ." Md. Code Ann., Art. 66C, § 720 (Michie 1957) (L-184).

Maryland failed to prove that Virginia state officials knew about either the 1957 or the 1968 permit.[9] It does not follow from the fact that a Virginia locality received a permit from Maryland that Virginia, as a sovereign state, acquiesced at the time in Maryland's permitting authority. "[A]cquiescence presupposes knowledge. . . ." *New Jersey v. New York*, 523 U.S. at 787. As a sovereign state, Virginia was no more on notice that Maryland had issued a permit to Fairfax County than New Jersey was on notice that New York had been recording vital statistics about the persons residing on the filled portion of Ellis Island, or that New York and New York City had been registering those "New Jersey" citizens to vote. *Id.* at 795-98. Virginia could not be expected to have protested Maryland's application of its permitting system to Virginia until such time as its responsible *state* officials became aware of that fact.

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9. The closest Maryland came was a *draft* letter dated February 1968 from Governor Spiro T. Agnew to Virginia Governor Mills E. Godwin, Jr. (MX 891/PMX X-48.) The draft referenced an alleged inquiry by Governor Godwin about the status of a permit for the Town of Leesburg. Maryland offered no evidence of the substance of Governor Godwin's inquiry, if any, or what he may have been told. The draft of a letter that was never sent fails to show that Virginia officials knew and approved of Maryland's assertion of regulatory authority in contravention of Virginia's Potomac River rights. Even assuming for the sake of argument that Virginia state officials knew about the 1968 permit, Virginia clearly protested Maryland's claimed authority eight years later. *See* Part II(C)(4), *infra*, at 36-43.

Nor could Fairfax County or the Town of Leesburg be deemed agents of Virginia for the purpose of giving up Virginia's compact rights or of acquiescing in Maryland's permitting authority. Under Virginia's "Dillon Rule," localities may exercise only those powers that are expressly granted by the General Assembly, and such powers as are necessarily implied from the express delegation. *E.g., Board of Supervisors v. Countryside Investment Co.*, 522 S.E.2d 610, 613 (Va. 1999); *County Bd. v. Brown*, 329 S.E.2d 468, 470-72 (Va. 1985). No Virginia locality has the power to relinquish an interstate compact right belonging to the Commonwealth. To the contrary, Virginia law is "well settled . . . that the power to amend and repeal statutes is vested exclusively in the legislature." 1978-79 Va. Att'y Gen. Rep. 110, 112 (VX 335/PVX 312); *see* Va. Const. Art. I, § 7 (Michie 2001) ("[A]ll power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.").

Federal common law would likewise not permit the actions of a locality or of a State's citizens to alter or restrict the State's interstate compact rights. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953) (ruling that the City of Philadelphia could not take a different position from Pennsylvania respecting the latter's interest in the Delaware River); *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) (refusing to permit Indiana citizens to question Indiana's bridge contract with Kentucky). "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40 (1947); *see also California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 276 n.4 (1982) ("California does not contend that, having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Such an argument is foreclosed by *United States v. California*. . . ."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to

a suit by it to enforce a public right or protect a public interest.").

In short, the prescriptive period asserted by Maryland did not begin to run until 1973, at the earliest, when Virginia state officials first knew that Maryland was requiring the FCWA to obtain a permit to withdraw water from the Virginia shore of the Potomac River.

4. Any Prescriptive Period Was Interrupted in 1976, When Virginia Protested Maryland's Claim.

Beginning in 1976, Virginia clearly protested Maryland's claimed authority to regulate Virginia's rights of access to the Potomac River, and Maryland clearly understood that its own authority was in dispute. This occurred during the States' negotiations concerning the federal legislation that ultimately became Section 181 of the Water Resources Development Act of 1976. Pub. L. No. 94-587, 90 Stat. 2917, 2939-40 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a. That legislation provided for the Secretary of the Army, the Commonwealth of Virginia and the State of Maryland to enter into an agreement apportioning the waters in the Potomac River during times of low flow. Virginia provided the Special Master with a comprehensive history of that legislation, the resulting Potomac River Low Flow Allocation Agreement of 1978 ("LFAA"), and the current water supply system for the Washington Metropolitan area. (*See* L-483 to L-501.)

Virginia's "non-acquiescence" was made clear in a number of ways, including the following:

- On July 8, 1976, Eugene Jensen, the Executive Director of the Virginia SWCB, wrote to Herbert Sachs, the Director of Maryland's Water Resources Administration: "*It should be stated for the record, that Virginia has not recognized the Maryland permit and appropriation authority* for Virginia waters nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785." Letter from Jensen to Sachs of 7/8/76 at 2 (emphasis added) (L-136).

- Sachs – the official most knowledgeable about Maryland's discussions with Virginia on this subject (L-422) – testified at his deposition in this case that "throughout my tenure with the Department I had seen several indications from writers in Virginia that they questioned Maryland's authority on issuing permits." (L-427; L-430 to L-431 (acknowledging several such incidents).)
- In three separate Congressional hearings during the summer of 1976, Virginia's representatives repeatedly asserted Virginia's unqualified right to withdraw water from the Potomac River pursuant to the Compact of 1785 and the Black-Jenkins Award of 1877. *See Potomac River: Hearings & Markup Before the Subcomm. on Bicentennial Affairs, the Environment, and the International Community, and the House Comm. on the District of Columbia*, 94th Cong., 2d Sess. 680, 693-94, 703 (1976) (Statement of E. Shiflet) (June 25, 1976) (L-215, L-221 to L-222) [hereinafter "First 1976 House Committee Hearings"]; *Omnibus Water Resources Development Act of 1976: Hearings before the Subcomm. on Water Resources of the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 2068-73 (1976) (Statement of J. Leo Bourassa) (Aug. 5, 1976) (L-231 to L-236) [hereinafter "1976 Senate Committee Hearings"]; *Water Resources Development Act of 1976: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works & Transportation*, 94th Cong., 2d Sess. 442-46 (Statement of Eugene Jensen) (Aug. 31, 1976) (L-241 to L-245) [hereinafter "Second 1976 House Committee Hearings"].
- On behalf of the United States Army Corps of Engineers, General Robert S. McGarry testified before Congress that the federal government disputed Maryland's asserted authority to allocate Potomac River water and that "Virginia interests among others would object to an act that said for ever and ever Maryland owned and could allocate that water." First 1976 House Committee Hearings at 22 (L-207).

- The Virginia SWCB actively opposed the initial draft of the water allocation bill, introduced by Maryland's representatives, because it did not include Virginia as a party and did not respect Virginia's authority in the Potomac River. The Virginia representatives testified that the bill "might deprive Virginia of its riparian rights to the waters of the Potomac River as guaranteed by the 1785 compact between Virginia and Maryland, and the arbitration award of 1877. . . ." 1976 Senate Committee Hearings at 2068 (L-231); Second 1976 House Hearings at 442 (same) (L-241).
- At a meeting between Virginia and Maryland officials on August 16, 1976, the Virginia representatives advised their Maryland counterparts, including Sachs, that "Virginia has vested rights to Potomac Water and *does not need to have an allocation permit from anyone to withdraw water*." Memorandum from Jones to Jensen of 8/17/76 (L-137) (emphasis added). Sachs admitted that "there were a number of instances where discussions like that occurred." (L-431; *see also* L-425 to L-428.)
- In response to Virginia's objections to the draft legislation, Maryland agreed to amend the bill not only to include Virginia as a party, but specifically to avoid any inference that water withdrawals by Virginia users were subject to Maryland's regulatory authority. In particular, the savings language was rewritten to provide that nothing in the statute would alter "any riparian rights or other authority of . . . the Commonwealth of Virginia, or any political subdivision thereof . . . relative to the appropriation of water from, or the use of, the Potomac River." Letters from Sachs & Bourassa to Gravel & Roberts of 9/7/76 (L-139, L-142). That language was incorporated into the final version of section 181(c). *See* 42 U.S.C. § 1962d-11a(c).
- Sachs confirmed in his deposition that the purpose of this change was to "leave open the question of whether

> Maryland could apply its permitting authority to Virginia. . . ." (L-438.) Sachs had previously testified before the House committee that Maryland would agree to such an amendment for the purpose of "*leaving open the question of whether Virginia entities are subject to Maryland authority.*" Second 1976 House Committee Hearings, *supra*, at 438 (emphasis added).

Virginia's actions clearly negated any inference that it was acquiescing in Maryland's view that it could regulate and control Virginia's Potomac River access rights. *E.g., New Jersey v. New York*, 523 U.S. at 777, 789 (noting that the prescriptive period ended in 1954, when New Jersey announced its plans to tax the filled portions of Ellis Island "if a private owner took over the Island"); *Oklahoma v. Texas*, 272 U.S. 21, 33, 38, 46, 47 (1926) (finding that the passage of a 1903 Texas law asserting its version of the boundary interrupted Oklahoma's prescriptive claim). International law treatises, including many of the ones cited in *New Jersey v. New York*, 523 U.S. at 786, 788, establish that protests of this sort interrupt the prescriptive period.[10] As one Eighteenth Century scholar put it: "If any one sufficiently declares by any sign that he does not wish to give up his right, even if he does not pursue it, prescription does

10. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 157 (4th ed. 1990) ("[W]hat suffices to prevent possession from bei..g peaceful and uninterrupted[?] In principle the answer is clear: any conduct indicating a lack of acquiescence. Thus protests will be sufficient."); 1 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 116, at 387 (rev. 2d ed. 1945) ("Obviously, a State may actively challenge the encroachments of a neighbor upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result."); 1 D.P. O'Connell, *International Law* 424-25 (2d ed. 1970) ("Diplomatic protest fulfils the same function in the international law of prescription as does the filing of a suit in the corresponding branch of municipal law."); 1 *Oppenheim's International Law* § 270, at 706-07 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) ("As long as other states keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order."); 1 Robert Phillimore, *Commentaries upon International Law* § 255, at 217 (Fred B. Rothman & Co. 1985) (1854) ("[T]he title of nations in the actual enjoyment and peaceable possession of their territory, *howsoever originally obtained*, cannot be at *any* time questioned or disputed . . . .").

not prevail against him. . . . Hence it is generally said that one's right is saved by protesting." Christian Wolff, *The Law of Nations Treated According to a Scientific Method* § 364 (1764), *reprinted in* 2 *Classics of International Law, Wolff*, § 364, at 187 (James Brown Scott, ed., 1934). Protest defeats prescription because it rebuts the doctrine's fundamental assumption: "the loss of the right from the presumed *intention to abandon it.*" *Id.* § 359, at 185 (emphasis added); *accord* C. Phillipson, *Wheaton's Elements of International Law* 268-69 (5th ed. 1916); T. Rutherforth, *supra*, Book I, Ch. 8, § 3, at 64; Emmerich de Vattel, *The Law of Nations* Book II, ch. 11, § 142 (1758), *reprinted in* 3 *Classics of International Law, Vattel*, at 156 (James Brown Scott ed., 1925). Virginia's repeated statements in 1976 made clear that it had no intention of abandoning its rights of access to Maryland's control.

Maryland misplaces its reliance on the July 29, 1977 letter from Virginia's Assistant Attorney General Frederick S. Fisher to Virginia's SWCB. (Md. Exc. at 48-49; L-145.) Fisher advised that Maryland infringed upon Virginia's compact rights by requiring permits from Virginia users. (L-146.) "To avoid any inference of Virginia's acquiescence," he recommended that the LFAA, which had not yet been signed, be amended to protect Virginia's rights even further. (L-147.) Fisher cautioned, however, that such an amendment, "unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, *in time*, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system." (*Id.* (emphasis added).) Fisher suggested that the SWCB consider recommending that the General Assembly enact its own permitting system to "assert Virginia's continued intent to claim its riparian rights. . . ." (*Id.*)

This letter demonstrates an intent to retain Virginia's rights, not abandon them. In fact, Virginia undertook a number of actions *after* that letter in order to protect its rights:

- On August 5, 1977, the SWCB advised Maryland that, at least until Virginia created its own permitting system for Virginians using the Potomac River, the Board was "agreeable" to Maryland's continued

operation of its permitting system for citizens on both sides of the River. Letter from Bourassa to Sachs of 8/5/77 (L-153). The letter was written on the advice of counsel specifically "to *provide evidence in a written document that Virginia is aware of its rights and intends to protect them.*" Memorandum from Fisher to SWCB of 8/4/77 at 3 (L-150) (emphasis added). The letter was designed to "authorize[] Maryland to operate a permit program on behalf of Virginia, *in effect as its agent.*" *Id.* (emphasis added). This was an affirmative assertion of Virginia's sovereignty, not an abandonment of it.

- On September 13, 1977, at a public hearing to discuss the draft of the LFAA, Thomas Schwarberg, representing the SWCB, testified: "The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by Compact and expects those rights to be honored. *Virginia has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions.*" T.M. Schwarberg, Virginia's Position on the Potomac River Low Flow Allocation Agreement, at 2-3 (Sept. 13, 1977) (emphasis added) (L-248 to L-249). (*See also* VX 293/PVX 258 at 74 (hearing transcript).)

- In December 1977, the Virginia representatives negotiating the LFAA obtained three additional concessions designed both to negate any inference that Maryland had the right to issue permits to Virginia users and to protect Virginia's authority to regulate its own citizens' use of the River in the future. (*See* L-498 to L-501.) Specifically:

  (1) Article 3(C) was amended to provide that nothing in the LFAA would restrict or limit any authority "the Commonwealth may have" to issue permits for Potomac River water withdrawals. (*Compare* L-303 (Art. 3(C), final version) *with* L-280 (Art. 3(C), 12/15/1977 draft).)

(2) Article 3(E) was rewritten to delete language that communities or entities withdrawing water had to do so as "as permittees of the State" of Maryland. As revised, the Article required all persons withdrawing water either to become a member party to the agreement (like the FCWA), or to be governed by "*a*" permit that includes the applicable low flow allocations. (*See* L-501 n.122 (showing comparison); *compare* L-304 (Art. 3(E), final version) *with* L-280 (Art. 3(E), 12/15/1977 draft).)

(3) Article 3(F) was added to provide, in pertinent part, that nothing in the LFAA affected any right of the parties "to grant" permits to appropriate water during periods when the Restriction or Emergency stages of the LFAA are not in effect. (L-305 (Art. 3(F), final version).) Sachs testified that the purpose of this language was to leave "open" the question of which jurisdiction had the authority to issue water appropriation permits. (L-450.)

- In 1979, Virginia enacted the "Potomac River Riparian Rights Act." 1979 Va. Acts ch. 307 (VX 99/PVX 296). (*See* L-501 to L-502.) The Act expressly reaffirmed the rights of the Commonwealth and its citizens "to the full enjoyment of their riparian ownership as provided at common law, and in § 7.1-7 of the Compact of 1785 with Maryland, and confirmed by the Black-Jenkins Determination of 1877 and Article VII, § 1 of . . . the Potomac River Compact of 1958." Va. Code Ann. § 62.1-44.114 (Michie 2001). The Act further directed the SWCB to assist any Virginian "[i]n the event non-Virginia claimants question or seek to abridge the riparian use of the waters of the Potomac River." *Id.* § 62.1-44.116.

- In October 1979, Schwarberg informed a Senate subcommittee that: "Virginia's riparian rights to the reasonable use of the Potomac River have been partially addressed by the Low Flow Allocation Agreement, and are being further pursued through

> . . . the Potomac River Riparian Rights Act." *District of Columbia Water Supply, Hearing before the Subcomm. on Gov'l Efficiency & the District of Columbia of the Senate Comm. on Gov'l Affairs*, 96th Cong., 1st Sess. 193 (Oct. 10, 1979) (Statement of Thomas M. Schwarberg) (L-259).

These acts clearly negate any inference that Virginia was abandoning her rights to Maryland.

5. The Period from 1979 Through 1997 is Inadequate.

Eighteen years elapsed between 1979 and 1997, when Maryland withheld a permit for the FCWA's offshore intake project. Since the FCWA and Virginia vigorously asserted that Maryland's treatment of the FCWA violated Virginia's compact rights (L-330 ¶ 4; L-402), Maryland must prove that Virginia had abandoned its rights of unrestricted access during the preceding 18-year period.

(a) The Period is Too Short.

Prescription requires acquiescence "over the course of a *substantial* period. . . ." *New Jersey v. New York*, 523 U.S. at 786 (emphasis added). Although the Court has declined to prescribe a minimum number of years, it observed in the Ellis Island case that a period as short as 60 years, which had been found sufficient in *Michigan v. Wisconsin*, 270 U.S. 395 (1926), was "enough to open the door to litigation. . . ." 523 U.S. at 790. Most of the Court's acquiescence cases have involved periods significantly longer, usually "approaching or exceeding 100 years." (Report at 78 & n.106.)[11] In cases finding acquiescence based on periods shorter than a century, the facts were compelling. For example, in *Indiana v. Kentucky*, 136 U.S. 479 (1890), which involved Indiana's acquiescence for more

11. *See Georgia v. South Carolina*, 497 U.S. 376, 391-93 (1990) (160 years); *California v. Nevada*, 447 U.S. 125, 126-30 (1980) (80 years); *Ohio v. Kentucky*, 410 U.S. 641, 645-52 (1973) (151 years); *Arkansas v. Tennessee*, 310 U.S. 563, 566 (1940) (114 years); *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934) (150 years); *Vermont v. New Hampshire*, 289 U.S. 593, 615-20 (1933) (121 years); *Maryland v. West Virginia*, 217 U.S. 1, 41-44 (1910) (103 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 505, 524 (1893) (85 years); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638 (1846) (125 years).

than 70 years to Kentucky's sovereignty over the Green River Island, *id.* at 509-10, the Court emphasized that the delay was so protracted that the essential facts had "long since passed beyond the memory of man" and "the very grandchildren of men then living are now hoary with age." *Id.* at 517. Here, by contrast, the official who knows the most about Maryland's dealings with Virginia in the 1970s concerning the Potomac River – Herbert Sachs – is *still* employed by Maryland and gave a deposition in this case (L-418), while Frederick Fisher, whose letter Maryland cites as evidence of acquiescence (Md. Exc. at 48-49), serves as one of Virginia's attorneys in this action.

This Court has never found a period as short as 40 years, much less 18 years, sufficient to establish prescription and acquiescence as between sovereign States.[12] The shortest such period in an interstate suit – 41 years – came in *Nebraska v. Wyoming*, 507 U.S. 584 (1993). Wyoming was foreclosed from challenging Nebraska's diversion from the North Platte River for the Inland Lakes project because the issue had been adjudicated in the Court's 1945 decree, partly at Wyoming's request, and Wyoming did not question that ruling until 1986. *Id.* at 587, 594-95. The Special Master correctly found that the facts of that case bear no resemblance to this one. (Report at 94 n.143.) Moreover, Maryland's prescriptive claim "has been punctuated with numerous challenges by Virginia to Maryland's permitting authority (and some acknowledgement thereof by Maryland, as in the Water Resources Development Act of 1976 and the Low Flow Allocation Agreement and negotiations leading to them.)." (*Id.* at 94.)

12. Maryland misplaces its reliance on *United States v. Stone*, 69 U.S. 525 (1865), in which the Court found that an *Indian tribe* had acquiesced for "more than thirty years" in a federal survey of a reservation boundary. *Id.* at 537. *Stone* does not show that a period exceeding 30 years is sufficient to prove prescription *as between States*. "The sovereignty that the Indian tribes retain is of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978); and "[a]n Indian Reservation is not a State." *Arizona v. California*, 373 U.S. 546, 597 (1963). Nor has the Court ever imported the 20-year period typically applied to prescriptive claims by private parties. While Black and Jenkins referred to that period, they based Virginia's prescriptive rights on its use of the Potomac "from the *earliest* period of her history. . . ." (S.M. App. D-18 (emphasis added).)

(b) Virginia Took Action Promptly After Maryland Denied It Access to the River for the First Time in 1997.

Maryland concedes that it had never denied any Virginian access to the Potomac River prior to the 1997 dispute between Maryland and the FCWA. (Md. Moot. Reply at 12 (emphasis added); Md. Moot. Mot. at 8 (same).) That is an important factor that justifies requiring a longer period to prove acquiescence. Until 1997, the instances in which Maryland issued permits to Virginia users simply did not threaten Virginia's rights of access to the River to such a "serious magnitude" that it would have warranted, "by clear and convincing evidence," the "extraordinary" invocation of the Court's original jurisdiction. *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Even after Virginia filed suit in February 2000, Maryland argued that Virginia's compact claims would not be ripe unless and until Maryland denied a permit to a Virginia user and that denial became final. (*See* Md. Br. Opp. LTF at 7-10, 15; Md. Moot. Mot. at 8; Md. Moot. Reply Br. at 5, 12.) Having taken that position, Maryland cannot argue that Virginia should have filed suit any sooner than it did.

If the Court were to find acquiescence on these facts, it would impose a hair-trigger for future original action filings between States. No State could afford to tolerate the slightest imposition on its authority for fear that failing to file suit immediately would constitute acquiescence and lead to the loss of valuable rights. States should not be discouraged from having "merely to tolerate" impositions on their authority "as a temporary expedient," *United States v. City & County of San Francisco*, 310 U.S. 16, 31 (1940), lest the Court undermine its "often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement.'" *Arizona v. California*, 373 U.S. 546, 564 (1963) (citations omitted).

(c) The Absence of Virginia Permitting Is Irrelevant.

Maryland exaggerates the significance of the fact that the Virginia Marine Resources Commission ("VMRC") does not issue permits for Virginia projects extending into the Potomac River. The VMRC lacks jurisdiction over projects extending beyond the boundary – not because Virginia is unable to regulate them – but because the VMRC's present jurisdiction over submerged lands is *statutorily* confined to "*state-owned* bottomlands. . . ." Va. Code Ann. § 28.2-101 (Michie 2001) (emphasis added). (*See also* L-334 to L-335, ¶¶ 2, 5.)

Virginia certainly has the power to regulate its citizens' water withdrawals and waterway construction activities in the Potomac River. Maryland neglects to mention that the construction of improvements appurtenant to the Virginia shore has long been subject to regulation by Virginia localities under the Virginia Uniform Statewide Building Code. Va. Code Ann. §§ 36-97 to 36-119.1 (Michie 1996 & Supp. 2002). The Building Code applies to, *inter alia*, "piers [and] wharves," *id.* § 36-97, even if they extend past the boundary line. (*See* MX 144/PMX CC-15 at 6.) Moreover, Virginia's State Water Control Law reaches all Virginia "State waters," which are defined as "all water, on the surface and under the ground, wholly or *partially within or bordering the Commonwealth* or within its jurisdiction. . . ." Va. Code Ann. § 62.1-44.3 (Michie 2001) (emphasis added). The SWCB obtained statutory authority to issue Virginia water protection permits in 1989. 1989 Va. Acts ch. 720, *codified at* Va. Code Ann. § 62.1-44.15:5 (Michie 2001). In August 2002, the SWCB issued a Guidance Document pursuant to which it will begin to issue permits to Virginians for Potomac River waterway construction and water withdrawals, once this litigation is successfully concluded. *See* 18 Va. Regs. Reg. 3601-03 (Aug. 26, 2002) (VX 128-29/PVX 341-42).

The relevant question, however, is not whether Virginia has sought to regulate its own citizens' access to the Potomac River, but whether Maryland has successfully *displaced*

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Virginia's right to have unrestricted access to the River subject to such regulation as Virginia deems appropriate for its own citizens. *See New Jersey v. New York*, 523 U.S. at 788 n.9 ("New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island. . . ."). Nothing in the Compact of 1785 or the Black-Jenkins Award of 1877 obligated either State to implement a permitting system to regulate their respective citizens' use of the River. Maryland did not do so until well into the Twentieth Century, and it cannot point to Virginia's delay in doing so to prove that Virginia somehow abandoned a centuries-old compact right to Maryland.

(d) Maryland's 1987 Tidal Wetlands Policy and the VMRC Staff Correspondence Do Not Prove Acquiescence.

Maryland also places undue weight on the policy that the Maryland Board of Public Works adopted in 1987, and formalized in a 1994 regulation, concerning tidal wetlands along the Virginia shore of the Potomac River. (MX 813/PMX AA-11; MX 815/PMX AA-13.) That policy, although reviewed at the staff level in Virginia, was "not reviewed or approved by the [Virginia Marine Resources] Commission" and does not represent an official policy of the Commonwealth of Virginia. (L-335 ¶ 4.) Moreover, the policy *exempted* the vast majority of improvements constructed at the Virginia shoreline, including non-commercial piers, boat ramps and bulkheads. (MX 813/PMX AA-11; MX 815/PMX AA-13 at 2.) Thus, although Maryland claims to have issued between 250 and 350 "authorizations" (Md. Exc. at 13), in reality, only some 63 of these involved an actual license (VX 280/PVX 136 ¶ 5). The rest consisted of letters reflecting no action by Maryland or stating that no Maryland license was required. (*Id.* ¶¶ 3-5; Report at 91.)

Maryland also misstates the significance of letters by which the staff of the VMRC, beginning in the mid-1980s, transmitted to Maryland authorities (as well to the U.S. Army Corps of Engineers) copies of correspondence with Virginia

landowners who were seeking to build improvements extending into the River. All such letters were written by *staff* members, not by the Commissioners who exercise the VMRC's policy-making authority. (L-335 ¶ 5.) While the staff has transmitted such correspondence to Maryland authorities "as a matter of administrative comity," it does "not intend its transmittal letters to constitute any sort of recognition that Maryland has any greater legal authority than it does, and the staff is certainly not authorized to bind the Commission with respect to the recognition of any such authority." (*Id.*) *Accord County of Fairfax v. Southern Iron Works, Inc.*, 410 S.E.2d 674, 682 (Va. 1991) ("[S]taff may not make substantive determinations of legislative intent which have the effect of changing what was duly adopted by the governing body."). Indeed, not even the appointed members of the VMRC would have the authority to alter or suspend the Commonwealth's interstate compact rights, even if that had been their intention. *See* Part II(C)(3), *supra*, at 35; *see also* 1991 Va. Att'y Gen. Rep. 41, 44 (stating that the Virginia Constitution prevents the Governor from "suspending the operation of a duly adopted statute in the absence of some other statute authorizing [him] to do so.").

D. A Court of Equity Would Not Give Maryland Control Over Virginia's Potomac River Access Rights.

Prescription is an equitable doctrine. *Ohio v. Kentucky*, 410 U.S. at 648. If one assumes for the sake of argument that a State can lose a federally-approved compact right by acquiescing in another State's prescriptive acts, the ultimate question would be whether a court of equity should give Maryland the right forever to control Virginia's access to the Potomac River. Under our federal system, the answer must be "no." As Chief Justice Marshall put it, "Would the people of any one state trust those of another with a power to control the most *insignificant* operations of their State government? We know they would not." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (emphasis added). For all the more reason, Maryland cannot be given the unprecedented power to control Northern Virginia's water supply or its access to this vital River.

III. ANS' ARGUMENTS ARE WITHOUT MERIT.

There is no need to address the arguments by the Audubon Naturalist Society ("ANS") on the merits of the case because those arguments, some of which were raised by Maryland before the Special Master (L-581 to L-586), are no longer maintained by Maryland here. *See New Jersey v. New York*, 523 U.S. at 781 n.3. ANS' jurisdictional claim requires only a brief response. This is the *fifth* time that ANS has argued that the case is not justiciable. Both Maryland and ANS raised the same arguments in opposing Virginia's motion for leave to file the Bill of Complaint. The Court nonetheless accepted jurisdiction and referred the case to the Special Master. When ANS renewed its objections, the Special Master patiently considered and twice rejected ANS' arguments, the second time "with prejudice." (S.M. App. F-3; Mem. Dec. Nos. 1, 2.) ANS then filed with this Court a Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, in which Maryland joined. After full briefing by the parties, the Court denied the motion. 531 U.S. 1140 (2001). The procedural posture of this case is remarkably similar to that in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where the Court implicitly rejected the defendant's jurisdictional objections on prior motions and was "not at all inclined to dismiss the action at this juncture." *Id.* at 446.

Even if the Court were to permit ANS to take exception to the Special Master's ruling on mootness when Maryland does not question it, the case is obviously not moot. Maryland continues to insist that Virginians submit to its permitting authority under penalty of civil and criminal sanctions. (S.M. App. F-7.) One of the conditions in the Maryland permit issued to the FCWA requires a permanent flow-restrictor limiting water withdrawals to the maximum allowed under the FCWA's water appropriation permit. (VX 318/PVX 253 at 19-20; L-337.) Maryland imposed that limitation for the express purpose of controlling growth in Virginia. (L-355 to L-356, L-360 to L-361.)

Maryland's continued control over Virginia's water withdrawals is a significant problem for the Commonwealth.

See Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982) (discussing Colorado's "substantial interest" in protecting its citizens' future use of the Vermejo River); *Kansas v. Colorado*, 206 US. 46, 99 (1907) (discussing the "state interest" of Kansas in protecting its citizens' use of the Arkansas River). *Twenty percent* of all Virginians who are not served by potable wells rely on the FCWA for their drinking water. (L-329 ¶ 1.) As of June 2001, the FCWA had invested more than $9 million for its share of three upstream reservoirs that store 17.2 billion gallons of water to supplement the River's natural flow for the benefit of the entire Washington Metropolitan area. (L-332 ¶ 8(b).) The FCWA's continued participation in regional cost sharing agreements is premised on its ability to withdraw water from the Potomac River as demands increase. (*Id.*) The FCWA and the Loudoun County Sanitation Authority both tendered un-rebutted affidavits stating that they will require increasingly larger quantities of water from the Potomac River in the future, and that their *current* water supply planning has been harmed by the political uncertainty associated with Maryland's control of their Potomac River access. (L-332 to L-333 ¶¶ 8(c), 9; L-327 to L-328.)

"[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Because Maryland knows it cannot meet that standard, it has not challenged the Special Master's ruling. ANS can do no better.

CONCLUSION

The Court should overrule Maryland's two exceptions, adopt the Report of the Special Master, and enter the Special Master's proposed Decree.

Respectfully submitted,

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Original Action No. 129

(12)

Supreme Court, U.S.
FILED
MAR 21 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

BRIEF OF AMICUS CURIAE LOUDOUN COUNTY SANITATION AUTHORITY IN SUPPORT OF REPLY BY THE COMMONWEALTH OF VIRGINIA TO THE EXCEPTIONS OF THE STATE OF MARYLAND TO THE REPORT OF THE SPECIAL MASTER

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I. INTRODUCTION, STATEMENT OF INTEREST OF AMICUS, AND SUMMARY OF THE ARGUMENT[1]

The Fairfax County Water Authority ("FCWA") instituted a plan to construct a drinking water intake structure in the channel of the Potomac River because the previous intake near the Virginia shore was subject to increased turbidity that raised treatment costs and created a greater risk of disease for consumers of treated water.[2] FCWA's plans set in motion a series of events that led Maryland to assert suzerainty over the rights of Virginia, its subdivisions, instrumentalities, and citizens in the waters of the Potomac River.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the amicus curiae have made any monetary contribution or monetary commitment to the preparation or submission of the brief. Counsel for Virginia was afforded the courtesy of previewing and commenting on the drafts of the brief prior to filing.

[2] While this action was pending, the State of Maryland granted permission for the FCWA to construct this intake. However, the new permit requires a flow-restrictor which limits FCWA's ability to withdraw water from the river.

A. Interest of Amicus Loudoun County Sanitation Authority.

The Loudoun County Sanitation Authority ("Loudoun Authority") is vitally interested in seeing that the Court affirms the findings of the Special Master. The Loudoun Authority is a public body politic and corporate and is also an instrumentality and political subdivision of the Commonwealth of Virginia authorized by the Virginia Water and Waste Authorities Act, Va. Code Ann. § 15.2-5114. The Loudoun Authority was created by action of the Board of Supervisors of Loudoun County pursuant to that legislation and was chartered by the State Corporation Commission on May 27, 1959. Because the Loudoun Authority has obtained the consent of both parties to this suit, it submits that it should be afforded *amicus* status as a matter of course under Rule 37.3(a), Rules of the United States Supreme Court.[3]

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[3] Letters of Consent from Virginia and Maryland have been lodged with the Clerk.

The Virginia Water and Waste Authorities Act and the Loudoun Authority's Articles of Incorporation provide that the Loudoun Authority is authorized to acquire, construct, improve, operate and maintain a water system for supplying and distributing water in Loudoun County. Loudoun County has imposed the responsibility upon the Loudoun Authority to meet the water needs of the citizens of Loudoun County. While the Loudoun Authority currently serves Eastern Loudoun County, its chartered service area includes all of the unincorporated areas of the County's approximately 517 square miles. The incorporated towns within the County operate water supply systems independently of the Authority.

In 1990, the Loudoun Authority provided water service to a residential population of 40,500 people. In 2002, the Loudoun Authority served a population of 120,000, an increase of over 190%. The Loudoun Authority estimates that it will be responsible to serve a population of 145,000 in 2005, 188,000 for the year 2010, and 265,000 for the year

2020. In 1990, the Loudoun Authority experienced a maximum daily water demand of 8.2 million gallons per day ("mgd") and expects this demand to grow to an ultimate water demand of approximately 75 mgd after 2020, an increase of over 900%.

Loudoun County is at the epicenter of Virginia's dispute with Maryland because Maryland's admitted efforts to regulate growth in Northern Virginia are principally directed against Loudoun County.

Although it might be possible for the Loudoun Authority to receive additional water capacity from the FCWA in the future, negotiations in this area have been slow, sporadic and uncertain. As a functional matter, the FCWA's new intake will not increase its overall capacity. The Loudoun Authority's ability to rely on the FCWA for its future water supply is uncertain at best. The FCWA's current permit to withdraw water from the Potomac River comes up for renewal in April 2008. A delay (or denial) by Maryland in granting a renewal similar to the delay in

granting the permit that was the initial subject of this case would have disastrous consequences for the citizens of Loudoun County. Furthermore, the flow-restrictor requirement imposed by Maryland in the existing permit stands as a stark reminder that Maryland still purports to retain the last word on any use of the river.

In an effort to meet the demands of its growing population, the Loudoun Authority purchased 22.7 acres along the Potomac River in Loudoun County, Virginia in 1993 for the purpose of constructing a water intake and treatment facility using Potomac River water. The Loudoun Authority plans to withdraw water from the Potomac River from its own intake system upon the non-tidal part of the Potomac River bordering the County. A "Master Plan" for meeting the current and future needs of the citizens of Loudoun County, including construction and use of the proposed intake, has been prepared and is under active consideration by the Authority's Board. The Loudoun Authority has undertaken a "Water Supply Augmentation

Study" as part of its Master Plan. As a result of this planning process, the Authority has determined that the Potomac River intake is necessary, and it intends to build the proposed intake. Maryland's claims of authority to regulate Virginia's use of the river stand as a substantial impediment to the Authority's ability to discharge its water supply responsibilities both in the present and the future.

Maryland's delay of the FCWA's intake for five years and its claims of right to prohibit or limit all intake permits, makes the orderly planning, design and construction of a water intake facility highly uncertain. The Loudoun Authority is at the point on its Master Plan where it would have begun the permitting process but for the fact that it is relying on Virginia in this suit to vindicate its right to be free from Maryland's permitting requirements. Should Virginia succeed in this regard, the Loudoun Authority will apply for the appropriate permits under 18 Va. Regs. Reg. 3601-03 (Aug. 26, 2001), which will become effective upon a favorable outcome in this case. Thus, putative *amicus*

Audubon Naturalist Society's ("ANS") stated concerns of a regulatory void are unfounded. (*amicus* Brief at 22).

B. Summary of the Argument.

By virtue of the Compact of 1785 between Virginia and Maryland, 1785 Acts c. XVII, codified in part at Va. Code Ann. § 7.1-7, 1786 Md. Laws c. I; the Black-Jenkins Award of 1877, Va. Code Ann § 7.1-7, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483; this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910); the Potomac River Compact of 1958, Va. Code Ann § 28.2-1001, Md. Code Ann., Nat. Res. § 4-306 (2002 Supp.), Pub. L. No. 98-893, 76 Stat. 797 (1962); the Low Flow Allocation Agreement of 1978; and the Water Supply Cooperation Agreement of 1982, it is clear that Virginia, and her subdivisions, instrumentalities, and citizens, have the right to build structures in the river that do not obstruct navigation, and that Virginia has retained its rights of access to the Potomac River, including a right to withdraw and use water without the prior consent of Maryland.

Maryland requires that anyone seeking to construct a facility to withdraw water from the Potomac River obtain permits including a waterway construction permit and a water appropriation permit. Maryland conditions the issuance of such permits on a showing that the appropriation, in Maryland's sole view, is "necessary." On November 30, 1999, in response to the situation precipitated by the FCWA's request to build its proposed off-shore intake, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or agree that permit approval is not required for such intakes. The Attorney General of Maryland replied on January 4, 2000, asserting Maryland's putative power to regulate Virginia's rights in the Potomac River.

As a consequence, the arguments of putative *amicus* ANS that Virginia's claims are moot or unripe are mistaken. Furthermore, the Commonwealth of Virginia clearly has standing to pursue this action *parens patriae*. The Commonwealth has a sovereign interest in protecting the

ability of her citizens to freely exercise their rights of access to the Potomac River free of the political whims of Maryland. Virginia also has quasi-sovereign interests in protecting the health and welfare of her citizens in general, which are being threatened by Maryland's express position on the use of Potomac River water, and in insuring that her residents are not being discriminatorily denied their rightful status within the federal system.

II. ARGUMENT

A. The Loudoun Authority's active plan to construct an intake into the Potomac River refutes the claims of ANS of mootness and lack of ripeness.

The Loudoun Authority is an owner of riparian property with a practical stake in the outcome of this proceeding. It therefore has a particular insight into the practical needs of a riparian owner actually intending to remove water from the Potomac River for the use of citizens of Northern Virginia above the fall line. As a consequence,

the Loudoun Authority has specialized information and a distinct perspective that may be helpful to this Court.

Contrary to the assertions of putative *amicus* ANS, there is at least one Virginia entity, the Loudoun Authority, which has imminent plans to withdraw additional water from the Potomac River. The Loudoun Authority's Master Plan calls for the construction of an intake into the Potomac River and a treatment facility that, together, will provide at least one-half of the County's daily water needs. This plan is not merely theoretical or a remote contingency; the plan has been extensively developed and is at the point where a permit would have been sought but for the fact that the Loudoun Authority agrees with the Commonwealth of Virginia's position that Maryland does not possess the authority to issue such permits.[4]

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[4] In fact, since July 2001 when your amicus submitted the declaration of Dale C. Hammes, the General Manager of the Loudoun Authority, for inclusion in the record (Va. Lodging 327), seven out of nine work tasks have been completed for the Water Supply Augmentation Study.

With respect to ANS' claim of mootness, the fact that a permit has been issued does not satisfy the heavy burden a litigant has when claiming mootness. As this Court has recently stated:

> It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ... '[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'... In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' ... The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (*citations omitted*). Not only is the challenged activity here clearly capable of repetition, it

has not even ceased. Maryland, through its requirement for a flow-restrictor for FCWA and through its unretracted claims of right, continues to create a situation which requires judicial resolution.

With respect to ripeness, the controversy between Maryland and Virginia could hardly be more present, immediate and concrete than it is. *See Clinton v. City of New York*, 524 U.S. 417, 430 (1998).

In light of these circumstances, your *amicus* respectfully asks the Court to accept the recommendation of the Special Master and hold that "Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac River and construct improvements appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland." Report of the Special Master at 96-97. The Loudoun Authority, acting on behalf of the citizens of Loudoun County, Virginia, should be able to construct a water intake to meet the needs of those citizens free of the

political choices of Maryland officials who have no duty to the citizens of Loudoun County.

B. The Commonwealth of Virginia has standing to pursue this action *parens patriae*.

It is well settled that a state has standing to sue when its sovereign or quasi-sovereign interests are implicated. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). The water rights disputes present here touch on both interests.

Sovereign interests are those in which the state, if it were an independent nation, could resolve through the use of diplomacy or force. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Surely, the use of an interstate waterway, without having to defer to the sovereign claims of another state, constitutes such an interest. The *parens patriae* doctrine, "is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. 369, 372 (1953). Here, the position taken by the

Commonwealth of Virginia, that the citizens of Virginia should be free to exercise their rights in the river without submitting to the political agenda of Maryland, is a proper exercise of its sovereign responsibilities and thus falls squarely within the *parens patriae* doctrine. *See Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (holding that state "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way").

The present case also touches on Virginia's quasi-sovereign interests. These interests fall into two general categories:

> First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). Virginia's interests are clearly implicated in both categories. It has been long established that where "the

health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Missouri v. Illinois*, 180 U.S. at 241; *see also Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902) (observing that a state is the proper party to represent and defend its citizens when their health and comfort is threatened through the acts of another state depriving those citizens of water rights). The need for sufficient water for Loudoun County's and Northern Virginia's projected population strongly implicates the health and comfort of that population.

Furthermore, it is clear from the record before this Court that the citizens of Virginia face disparate treatment from Maryland in terms of access to the Potomac River. The express purpose of the supporters of the so-called Potomac River Protection Act was to curb the growth of Northern Virginia, with a focus on Loudoun County. Given the politicized treatment and consequent delay in processing the FCWA's request to build an offshore intake, there is no reason to believe the Loudoun Authority would fare any

better should it seek a permit. While the FCWA's permit was eventually granted after protracted delay and great expense, it is clear that Maryland officials can make the process difficult, time-consuming and expensive in order to serve Maryland's opposition to growth in Northern Virginia.

Finally, the position taken by putative *amicus* ANS that individual water authorities and jurisdictions must pursue individual actions to protect their own interests (*see amicus* Brief at 12), is unsupportable under the facts and circumstances of this case. In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court held that the Commonwealth of Pennsylvania, which was allowed to intervene, was in a better position to represent the needs of all its citizens than the City of Philadelphia, which was not allowed to intervene, because Philadelphia represented "only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *Id.* at 373. Here, Virginia represents the FWCA, the Loudoun Authority and all of Virginia's other citizens

and subdivisions by virtue of *parens patriae*. The Loudoun Authority, in turn, is speaking only because the parties have consented, and the rules of this Court therefore permit its views to be aired.

The various sovereign and quasi-sovereign interests being asserted here are at least as varied and strong as those advanced by Colorado in *Colorado v. New Mexico*, 459 U.S. 176 (1982), where this Court noted:

> New Mexico also contends that Colorado is improperly suing directly and solely for the benefit of a private individual -- C.F. & I. ...
>
> ...
>
> ... While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99, 27 S.Ct. 655, 668, 51 L.Ed. 956 (1907), we concluded that '[t]he controversy rises ... above a mere

> question of local private right and involves the matter of state interest and must be considered from that standpoint.'

459 U.S. at 181 n.9.

The present case is in all respects a concrete dispute among co-equal sovereigns of the sort that this court regularly decides.

III. CONCLUSION

Because the Report of the Special Master is correct in all respects, the Loudoun Authority requests that this Court adopt the Report of the Special Master and enter the Special Master's proposed Decree.

Respectfully Submitted,

LOUDOUN COUNTY
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No. 129, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

LODGING ACCOMPANYING REPLY BY THE COMMONWEALTH OF VIRGINIA TO THE STATE OF MARYLAND'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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Map. 12371. 24.
US17570.4.5

REPORT

AND

JOURNAL OF PROCEEDINGS

OF THE

Joint Commissioners

TO

ADJUST THE BOUNDARY LINE

OF THE STATES OF

MARYLAND AND VIRGINIA.

Authorized by the Act of 1872, Chapter 210.

ANNAPOLIS
S. S. Mill[illegible] J. F. Colton, Printers to the House of Delegates.
1874.

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BEST AVAILABLE COPY

Peabody Institute, Baltimore, Nov. 22, 1878.

I send to-day the Md. Boundary Controversy - a scarce publication but important in the history of the State. I obtained it from Geo. W. Williams of the Class of 1839. to whom please credit it. The map giving the decision of the arbitrators, just out, will be sent in a few days. also from Mr. Williams - a member of the Legislature. He had but two copies - one he gave us & one he was willing to let you have.

N. H. Morison.

REPORT.

To His Excellency, Wm. Pinkney Whyte,
Governor of Maryland.

Sir:—The Commissioners on the part of Maryland, authorized by the Act of 1872, chapter 210, to confer with Commissioners on the part of the State of Virginia, with a view to adjust the boundary line between the two States, have the honor to submit to your Excellency, and through you to the General Assembly, the following report of their proceedings.

It will be remembered that the Commissioners on the boundary line appointed in 1858 and 1867, by the States of Virginia and Maryland respectively, were empowered to adjust and run the divisional line between the two States, from Smith's Point, at the mouth of the Potomac River, to the Atlantic Ocean; and it was not until the present Commissioners met the Commissioners of Virginia, to wit: the Honorables Henry A. Wise, D. C. De Jarnette and Wm. Watts, at Washington city, on the 1st February, 1872, that they were informed that the Virginia Commissioners were authorized to adjust the entire boundary line between the two States; that they claimed for Virginia, to the north bank of the Potomac River; and Point Lookout, as the starting place from the Western Shore across the Chesapeake Bay; and that they could not treat with the Maryland Commissioners until *they* were invested with like powers—hence the authority conferred upon us by the Act of 1872, chapter 210.

Our first joint meeting was at the city of Annapolis, on the 7th of May, 1872. After some days consultation, with a view to a definite understanding of the points of difference between the Virginia Commissioners and ourselves, it was agreed to proceed to the town of Crisfield, in Somerset county,

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and there, and upon Smith's Island, take the depositions of witnesses in relation to the boundary line upon the Eastern Shore; and that afterwards "the Commissioners of each State should furnish to those of the other State, at the earliest convenience of both, a written statement of the boundaries claimed by each; referring to any documents, maps or other evidence by, and under which, either State claims, but not confining either party to the evidence so adduced; the object being to furnish only the statement of the claim on either side. That each should state the location of claim on the Potomac; and each should designate what it claims to be, the true Watkins' Point, or part of Watkins' Point, on the Eastern Shore, or what point is claimed to be the initial point of the line on the Eastern Shore, and what is claimed by each to be the course of the line on the Eastern Shore, with a reference to the evidence on which the claim rests."

The Commissioners of both States met at Crisfield, pursuant to adjournment, on the 22d of May, 1872, and were engaged until the 6th of June following in taking depositions of witnesses there, and upon Smith's Island, in relation to the traditions concerning the boundary line between the two States, the changes in the shores and islands of the Eastern Shore, &c. These depositions will be contained in an appendix to this report. The Maryland Commissioners met in the city of Baltimore on the 3d of September, 1872, pursuant to the adjournment at Crisfield, but here they received a request of the Virginia Commissioners to postpone the joint meeting, first to the 17th of September; afterwards to further postpone until the 1st of October, 1872. A joint meeting was held at Baltimore from the 1st to the 6th of October, 1872, inclusive; at which the statement of the Maryland claim was read to the Virginia Commissioners, and a copy thereof was delivered to them. General Wise, on behalf of the Virginia Commissioners, read several pages of a statement of their claim of boundary, and verbally indicated the line of argument by which they intended to sustain it; but they were not then prepared to furnish us with a copy of their statement.

a copy

Several propositions for an adjustment of the boundary line were successively submitted by the Commissioners of each State, and each was successively declined. Finally, each party announced to the other, that they had no further proposition to submit. The several propositions reciprocally offered and declined, will be found in an appendix to this report, containing the "Journal of Proceedings of the joint meetings."

This inability to agree, caused profound regret. The Virginia Commissioners remarked that they had three times met us in Maryland, and were unwilling to separate finally, without a further effort to agree upon a compromise line. And with a view to allow further time to prepare the Virginia statement, they requested us to meet them at Richmond, Virginia, on the 7th of November, 1872, to which we acceded. We went to Richmond accordingly, and were met by Col. De Jarnette, only; Gen'l Wise being unexpectedly called away and detained by a professional engagement elsewhere; and Col. Watts, as we afterwards learned, being prevented from attendance by severe indisposition. Col. De Jarnette informed us that the statement of the Virginia claim had been prepared, but not having been copied, he was not prepared to furnish us with it. On the evening of the 9th of November the Commissioners present adjourned to such time as should thereafter be agreed upon. On the 3d of December, 1872, Mr. Jones received from Gen. Wise a copy of the statement of the Virginia Commissioners, with a request that after we had duly considered it, we would inform the Virginia Commissioners when and where another joint meeting could be held.

The Maryland Commissioners met at Princess Anne shortly after receiving the Virginia statement, and carefully considered it. The conclusion to which we came was, that it was impossible for us to agree to the boundary line claimed in that statement. And the failure to agree upon any compromise line at the previous joint meeting, together with the extreme positions assumed in their statement, impressed us

with a grave apprehension that a further effort to agree at a future joint meeting, would likewise result in failure. Mr. Jones was requested to inform the Virginia Commissioners of this conclusion, and to make such reply to their statement as he might deem appropriate. Several causes intervened to delay compliance with this request. Mr. Jones was, however, engaged in preparing a reply to the statement of the Virginia Commissioners, when on the 28th of October last he received a letter from Gen'l Wise, requesting to be informed when and where another joint meeting could be had, in order to a further effort to come to an agreement, and intimating a willingness to meet the Maryland Commissioners in Baltimore city. To this we readily agreed, and a meeting was arranged to take place in Baltimore on the 18th November, 1873. The Maryland Commissioners were all in attendance on the 18th, but only Gen'l Wise of the Virginia Commissioners was present. On the 19th November, Col. Watts arrived, and Gen'l Wise announced that he had received a letter from Col. De Jarnette, stating that he could not be present for several days. The day was occupied by the Commissioners in attendance, in the examination and discussion of maps and documents in the rooms of the Maryland Historical Society. At a joint meeting on the 20th November, 1873, General Wise, on behalf of the Commissioners of Virginia, submitted to the Maryland Commissioners the following proposition of boundary by way of compromise, viz: "To commence at the point in the channel of the river Potomac, opposite the point where the States of Virginia and West Virginia are co-terminus on the right bank of said river, and to follow the main channel of said river to the mouth thereof at the point where the meridian of Point Lookout, the north headland of said river cuts the 38th parallel of north latitude, and this line shall be henceforth held and deemed the divisional line of the States of Maryland and Virginia, west of the Chesapeake Bay."

The Maryland Commissioners declined to accept this proposition, and announced that they preferred to leave the boun-

dary of the two States on the Potomac, as it was described in the Constitution of Virginia in 1776, and in the compact between the two States in 1785, and proposed to consider the adjustment of the boundary from Smith's Point at the mouth of the Potomac River, across the Chesapeake Bay, and the Eastern Shore to the ocean.

The Virginia Commissioners acquiesced in the suggestion, and requested the Maryland Commissioners to submit any proposition of compromise in accordance therewith. Thereupon the Maryland Commissioners submitted the following, viz:

"The boundary line from Smith's Point to be a right line across the Chesapeake Bay to the centre of Cedar Straits upon Tangier Sound, near the south end of Watkins' Point; thence by a right line, in a southeasterly direction to the channel of Pocomoke Bay or River nearest to Cedar Straits; thence up, by and with the centre of the channel of said bay or river to the point therein opposite the place on the east shore of said river, ascertained by De La Camp in 1867 to be the beginning on said shore of the divisional line, said to have been run and marked by Calvert and Scarborough in 1668; and thence by and with said divisional line as surveyed and laid down on the maps made by said De La Camp for the Joint Commission of Virginia and Maryland in 1868, to the Atlantic Ocean. The right of fishing and taking oysters in Pocomoke Sound, or bay and river, and in Tangier Sound, from the south end of Tangier and Watts' Islands to the north end of Deal's Island; and thence west to the Chesapeake Bay, to be common to the citizens of both States, and subject to concurrent regulation by the two States."

The Virginia Commissioners declined to accept the said proposition, although the clause relating to Tangier Sound was inserted upon the suggestion of General Wise, that it would be thereby rendered less objectionable to Virginia. The Maryland Commissioners thereupon annouced that they had no other proposition of compromise to submit. The Virginia Commissioners, by way of compromise, submitted the

following proposition; "To commence at the point in the mouth of the Potomac River, where the meridian of Point Lookout, the northern headland of said mouth of said river cuts the 38th parallel of north latitude, and to run a right line across Smith's Island to the low water-mark of the north headland of Little Annamessex River; thence a right line to low water-mark at the end of Watkins' Point at Cedar Straits; thence to the channel of said straits; thence a right line to the mouth of East Creek, at the head of Pocomoke Sound; and thence on and by the right bank of Pocomoke River, to the point where the line run by Philip Calvert on the part of Maryland, and Edmund Scarborough on the part of Virginia, in the year 1668, crosses said river of Pocomoke; and thence by said Calvert and Scarborough line to ocean."

This proposition was respectfully declined by the Maryland Commissioners. Whereupon Mr. Wise, on the part of the Commissioners of Virginia, offered the following proposition, viz:

"To commence as described in the last proposition, and to run on the 38th parallel of north latitude until said parallel reaches low water-mark on the eastern coast of Smith's Island; and thence to run a right line to the former location of a light-boat, as described in the maps reported by Michler and De La Camp in the years 1858 and '59, near the north headland of Little Annamessex River on Jeans' Island; and thence a right line to the channel of Cedar Straits; and thence a right line to the head of Pocomoke Sound, and up the Pocomoke River, and across the same; and thence by the Scarborough and Calvert line of 1668, to the ocean."

This proposition the Commissioners on the part of Maryland respectfully declined to accept. And thereupon the Commissioners on the part of Virginia announced that they had no other proposition of compromise to submit.

Thus having failed to agree upon a line of boundary between the two States, to be submitted to the General Assembly of each State for approval or rejection, the Commissioners agreed to adjourn the joint meeting, sine die, and to

report their proceedings to the Governors and Legislatures of their respective States, and did adjourn accordingly on the 20th of November, 1873.

It will be seen that the ultimatum submitted by the Maryland Commissioners was substantially the line first proposed by them at the joint meeting at Baltimore, in October, 1872. After the most patient and laborious research, and with the most earnest wish to concede everything that could be reasonably claimed by Virginia, and for the purpose of an amicable adjustment; the first proposition we submitted in October, 1872, with the lights then before us, was, in our deliberate judgment, the most favorable proposition for Virginia that Maryland could afford to make, and all that could possibly be successfully claimed by her before any impartial tribunal. We submitted at the meeting of October, 1872, with reluctance, the other two propositions of compromise as found in our Journal, and if either of them had been *then* accepted, we would have reported it in good faith to our Legislature, and have recommended its adoption by compact between the two States, as a final adjustment of the boundary between them. Their rejection was not unexpected, from the confident tone with which the Virginia Commissioners urged their extreme claims.

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But at the final meeting at Baltimore, it was impossible for us to renew either of those propositions. During the year which had intervened, Mr. Jones had discovered new, and in our judgment, conclusive evidence, sustaining Maryland's claim. This was submitted to the Virginia Commissioners, and may be briefly stated as follows: Mr. Jones produced first, a small book published in London in 1678, entitled "A description of the Island of Jamaica, with the other Isles and Territories in America, to which the English are related;" "By Richard Blome."* It contained "A description of Virginia, its bounds," &c.; "For its northern

* For the loan of this rare book, and for copies of the Report of the Virginia Commissioners to the General Assembly of 1873, and of several valuable Maps, the Maryland Commissioners are indebted to Col. Thomas H. Wynne, of Richmond, Va.

bounds, Maryland." Also, "A description of Maryland, its situation and bounds," viz: "The province of Maryland, lying between the degrees of thirty-seven and fifty minutes, or thereabouts, and forty degrees of northerly latitude. It hath for its bounds, on the south, Virginia, (*from which it is parted by the river Patomeck, whose southerly bank divides the province from Virginia;*) on the east, the Atlantic Ocean and Delaware Bay; on the north, New England and New York, formerly part of New England; and on the west, the true meridian of the first fountain of the river of Potomeck." This book of Blome's contains a brief history of all the British isles and provinces in America, and their climate, productions, population, trade, &c., &c., and appears to embody the most authentic account extant at that date. It is dedicated, "To His Sacred Majesty, Charles the Second." In fixing the bounds of Maryland at 37° 50′ north latitude, and on the southerly bank of the Potomac River, it sustains Lord Baltimore's map, published in 1635; and the description and map of Maryland in Ogilby's America, published in 1671; and every other map that has been found down to 1751.

Secondly.—Mr. Jones referred to Herrman's map of Virginia and Maryland, copies of which, he understood from Col. De Jarnette, were in the possession of the Virginia Commissioners. The map of Herrman was made in 1670, and sent to Lord Cecilius Baltimore in London; that it was shown by Lord Baltimore to King Charles the Second, to the Prince of Wales and the Privy Council, who pronounced it to be the best map that had ever been made of any country, and recommended it to the press. It was engraved by Wm. Faithorne, a celebrated engraver, and "published by authority of the King's special license granted to Herrman and Withinbrook, his assignee, in the year 1673." On this map the boundary line of Virginia and Maryland is dotted on the most southerly and westerly branch of the Potomac, and on the southern bank of that river down to a point at its mouth, not named, but extending into Chesapeake Bay, between the

Potomac and Little Wicomico Rivers, and from this point it is dotted a due east course, on the parallel of 37° 50′, or thereabouts, leaving the island, since known as Smith's Island, entirely in Maryland, passing near the south end of Watkins' Point, across Pocomoke Sound or Bay, and from where it strikes the east shore of that bay; the line to the ocean is marked by a double row of trees, and near the line it is thus stated: "These limits between Virginia and Maryland are thus bounded by both sides deputies, the 27th May, 1668, marked by double trees from this Pocomoke, east to the seaside, to a creek called Swanesecute Creek."

Although it is now known that an east line from Cedar Straits, through which Herrman's line ran, would not strike the Calvert-Scarborough line, but fall south of it, yet this map, made but two years after this line was run *and marked on the land*, is evidence of what was then understood to be the boundary line from the southern end of Watkins' Point, over the wide expanse of the waters of Pocomoke Sound, and across the peninsula to the ocean; especially as Herrman must have known that the report of Calvert and Scarborough stated that they had "run an *east* line."

As fully sustaining the statement of Chancellor Bland, 2 Bland, Cha. Rep. 127, (that to the call for the right bank of the Potomac, Maryland has always held,* and that under that holding all the islands in the river have been granted by patent from the Land Office, or legislative enactments, or titles derived from this State. Mr. Jones stated that he had obtained from the Land Office of Maryland, references to the dates of the grants of many of those islands, and was informed that every island in the river, from its source to Smith's Point, is now held under Maryland titles He also referred to the case of Chapman vs. Hoskins, 2 Johnson, Chancery Decisions 485, December Term, 1851, in which it appears that Hoskins, a citizen of Virginia, residing in Alexandria, obtained a special warrant from the Land Office of Maryland,

*More accurately—"had held, until her grant of riparian rights to Virginia by the Compact of 1785."—*I. D. J.*

to take up five acres of vacant land lying in Charles county, being an island or bar in the Potomac River, commencing below Craney Island and adjoining thereto. Under this warrant the surveyor of Charles county had surveyed the said island or bar, and returned his certificate to the Land Office, calling it Hoskins' Island; Chapman of Charles county caveated the certificate, claiming the land described therein, as being included in a Maryland patent granted in 1673, of a tract of land called "Grimes' Ditch," which included an island in the Potomac River about half a mile from the shore, (which he averred was then known as Craney Island,) and which had formerly contained a large body of land; but then was nearly all washed away.* George W. Brent, an Attorney, residing in Alexandria, and Robt. J. Brent, of Maryland, were counsel for Hoskins, and after full argument, in which no question was intimated as to the land not being in Maryland, (although it was on the Virginia side of the channel,) Chancellor Johnson decided that upon the evidence, Chapman could make out a good title under the grant of Grimes' Ditch, and under the long continued and exclusive possession of himself and those under whom he claimed, and therefore, he refused to grant Hoskins a patent. In his opinion, the Chancellor refers to the case of Carpenter vs. Mundus, decided by Chancellor Bland in 1845, in which Chancellor Bland held that Carpenter, the caveator, whose land lay on the Virginia side of the river, from which the island was separated by its navigable waters, had no claim to the island as riparian proprietor. The "Island of Eden," in Potomac River in Prince George's county, 10 miles above the second falls, granted by Maryland in 1723, was the subject of litigation in the Supreme Court of the United States, (see 6 Cranch, 237,) but only as to the *construction* not the *validity* of the Maryland title.

4th—Mr. Jones produced the original report of James Boyle, one of the Maryland Commissioners appointed under

*This island is laid down on Griffith's Map of Maryland, 1794, and called Crane Island. It is near the Virginia shore.—*I. D. J.*

the Maryland Act of 1818, Ch. 206, to settle and adjust with the Virginia Commissioners, the western limits of this State and the dividing line and boundary between this State and the Commonwealth of Virginia. This report was found in the office of the Adjutant General, at Annapolis, in April last, and was handed by Adjutant General McBlair to Mr. Jones, as appertaining to the history of the boundary controversy on the line of the Potomac. Chancellor Johnson, Ezekiel Chambers and James Boyle were, in 1824, appointed Commissioners by the executive of Maryland, under the Act of 1818, Ch. 206, to meet the Commissioners appointed by Virginia. Chancellor Johnson died on his way to the place of meeting, and the survivors, when they reached Smith's tavern, in Western Maryland, were met by the sad intelligence. Being but a day's journey from the Fairfax Stone, they deemed it proper to visit it, and ascertain how far the Fairfax Stone was from "the most western source of the north branch of the Potomac River;" which was the point of beginning specified in the Maryland law. The Virginia law had directed her Commissioners to begin at the Fairfax Stone. Mr. Boyle states that the Maryland Commissioners soon discovered that the difference between the two places of beginning embraced a section of country about one mile in width, and thirty-six miles in length. The Commissioners of the two States finding themselves clothed with dissimilar powers were unable to make any adjustment. The report of Mr. Boyle states an important fact, which we had in vain searched the records and histories of Maryland and Virginia to ascertain, viz: why the dividing line from the Pennsylvania line to the Fairfax Stone ever came to be run, or to be recognised by Maryland. It was well known that the Fairfax Stone was planted on the 17th October, 1746, by Commissioners appointed by direction of James the Second to trace the dividing line between Virginia and Maryland, and the lands of the King and those of the Fairfax grant—(1 Howison Hist. of Va.)

It was equally well known that Lord Baltimore was no

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Illegible

party to that proceeding, and that his rights were not affected by it; that he claimed to the south branch of the Potomac, down to the revolution of 1776. Mr. Boyle says: "The present line (as it is called by a vulgar error) between Virginia and Maryland, was laid down by Francis Deakins, with a view to locate bounties of land to the war-worn veterans of the Maryland line; and in a spirit of grateful remembrance for their services, he was expressly enjoined to avoid all conflicting title. This line is declared by the Legislature of this State, in the year 1788, to be far within that, which this State may rightfully claim as its western boundary; and that at a time of more leisure, the consideration of the Legislature ought to be drawn to the western boundaries of this State."

It is manifest to any one who has carefully investigated the history of the controversy, that Lord Baltimore was clearly entitled to the half million acres of fertile land between the south and north branches of the Potomac; that so far as the title to the land was involved, by conflicting grants, it was merely a contest between two subjects of the crown of Great Britain, Lord Baltimore claiming under the elder grant from Charles the First, and Lord Fairfax claiming under a junior grant from Charles the Second, and that Lord Baltimore was so embarrassed by troubles, internal and external, that he was not able to take possession of the land claimed, and assert his title.

Before he was aware of it, Lord Fairfax, in 1784, had opened a Land Office in the Northern Neck, and induced settlers to occupy and accept from him, deeds and leases of large tracts of country between the north and south branches; and being a citizen and resident of Virginia, and claiming to be proprietary of the land, he continued to make such grants down to the time of his death, in December, 1781.* Even after the State of Maryland had become sovereign, and the Constitution of the United States had gone into opera-

*Lord Baltimore also made grants of land between the south and north branches of the Potomac.—*I. D. J.*

tion, she might have asserted her right to the south branch with very probable success, upon the recognition of the charter rights of Maryland contained in the Virginia Constitution of 1776, and the compact with Maryland, of 1785. Lord Fairfax died, seized and possessed of about three hundred thousand acres of the Northern Neck, which he devised to the Rev. Denny Martin, in England, an alien, who assumed the name of — Fairfax, and brought ejectment, in 1791, against David Hunter, who claimed a tract of land in the Northern Neck, under a grant from Virginia, made to him in 1789. The State of Virginia claimed under her Acts of confiscation, which the court held to be insufficient. The case was heard on appeal, in the Supreme Court of the U. States, in 1813, and the title of Denny Fairfax was sustained. (Fairfax's devisee vs. Hunter's lessee, 7 Cranch, 603.)

Chief Justice Marshall did not sit in the case, and it appears from Mr. Boyle's report that, "in the year 1796, or earlier, a company of gentlemen, of whom Chief Justice John Marshall was one, purchased from Denny Fairfax all his claim; and the Commonwealth of Virginia subsequently obtained the right of those gentlemen." The opportunity afforded at the time of the compact of 1785, to adjust the controversy over the land to the south branch, was unfortunately lost.

"The time of more leisure, for the consideration of the western boundaries," contemplated by the General Assembly of 1788, did not arrive. True, in 1795 and 1796, and in 1801, Maryland appointed Commissioners, but Virginia was then unwilling even to enter into a discussion of her right to the territory between the two branches, and so the negotiation ended. Another resolution like that of 1801 was passed in 1810, but nothing else was done until the appointment under the Act of 1818, already mentioned. McMahon's Maryland, 67. Mr. Boyle's report does not appear ever to have been printed, and the plat made by the Chief Engineer, therein referred to, and the report of Col. Chambers, if he made one, have not been found. If any such plat or report had been

known to McMahon, he would doubtless have referred to it. The matter was attempted to be revived about 1832, but soon was permitted to fall asleep again. It slept until the urgent exigency under which the line run by Deakins from the Fairfax Stone to the Pennsylvania line, and the fact that it was a mile east of the "first fountain," of even the north branch, were forgotten;* and so finally, in 1852, Maryland proposed to run and mark the line from the Fairfax Stone, and to accept it as the western boundary of the State.

In regard to Virginia's refusal to accept the Maryland proposition of 1818, to adopt the most western source of the north branch as the point from which the western boundary should start, (by her Act of 1821, instructing her Commissioners to commence the western boundary at the Fairfax Stone,) McMahon, in his History of Maryland, published in 1831, says:—

"Maryland having by her Act offered to relinquish all claim to the territory south of the north branch, it was not to be expected, after this concession, that she should adopt, as the source of that branch, a point determined as such, by her interested adversaries, during the progress of the controversy. The spirit of amity and concession which had characterised all her proceedings in her repeated efforts to close this controversy, had been met, at every step, by one of obstinate adherence, on the part of Virginia, to the full extent of her pretended claims; and it did not become her dignity as a State to submit herself implicitly to any terms which the latter might dictate"

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*This is manifest from the terms of the preamble to the Act of 1832, chapter 275, to wit:

"Whereas, it is of great importance that the western territorial limits of this State of Maryland be clearly defined, and her boundaries permanently established; *And whereas*, the true location of the western line of Maryland between the States of Maryland and Virginia, beginning at or near the Fairfax Stone, on the north branch of the Potomac River, at or near its source, and running in a due north line to the State line of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise; *And whereas*, the States of Virginia and Maryland have both granted patents to the same tracts of land, at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court for Allegany county, in the State of Maryland, by persons holding under Maryland patents, against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line."

And yet, wearied out by the controversy, she ultimately, by the Act of 1852, chapter 275, proposed to Virginia to surrender her claim, not only to the south branch, but also to the true meridian of the first source of the north branch, and to run the western boundary from the Fairfax Stone. As fully set forth in the "statement of the Maryland case," the Virginia Act of 26th of March, 1858, states in its preamble, that Maryland had passed two acts for running the boundary line between that State and the State of Virginia, "beginning therefor at Smith's Point, at the mouth of the Potomac River, and running *thence* to the Atlantic Ocean, *to form the eastern line;* and beginning at the Fairfax Stone, on the Potomac River, sometimes called the north branch of the Potomac River, at or near its source, and running thence due north to the line of Pennsylvania, for forming the western boundary line;" the Act then requires the Governor to appoint a Commissioner, who, with a Commissioner to be appointed by Maryland, "shall cause the said lines to be accurately surveyed, traced and marked with suitable monuments, from Smith's Point, at the mouth of the Potomac River to the Atlantic Ocean; and from Fairfax Stone, situate as aforesaid, to the Pennsylvania line." The Acts of both States required a joint report to be made to the Legislature of each State; and upon the ratification of such report by the Legislatures of the two States, the lines should be fixed and established; to remain forever unless changed by mutual consent. The Commissioners of the two States found the directions for the survey of the southern line two indefinite. They were to "retrace and mark the boundary line between Smith's Point, at the mouth of the Potomac and the Atlantic;" but no intermediate point being given, they were at once met by the question of the locality of Watkins' Point. They concluded to obtain the best local information by an actual survey of the vicinity of the boundary, and to lay the facts before their respective Legislatures for their action thereon. But there being no such difficulty in regard to the western boundary, they caused the survey of that line to be commenced, and

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before it was finished they made, in 1859, a joint report of their proceedings, with estimates of expenses to complete the surveys and to erect permanent monuments to mark the boundaries the two States might concur in establishing. The Legislature of Virginia, in 1860, passed a preamble and resolutions, reciting the Maryland Acts of 1852 and the Virginia Act of 1858, "providing for the surveying, retracing and marking of the boundary line between the two States, which runs from Watkins' Point on the Eastern Shore, to the Atlantic Ocean;" the appointment of Col. Lee, of Maryland, and Col. McDonald, of Virginia, "Commissioners, jointly to have (among other things) the said line retraced, surveyed and marked," and that they had caused said line to be retraced, &c., and plats made of the same: And, Resolved 1. —That suitable and permanent monuments should be erected at the termini and along said line, at the joint cost of the two States. 2.—That the Governor, if he deem it expedient, send to England an agent to obtain all record and documentary evidence tending to show the true lines of boundary between Virginia and the States of North Carolina, Tennessee and Maryland. The resolutions contained not one word about the western boundary.

Maryland, by the Act of 1860, chapter 385, enacted: That the line established by the agreement of the Commissioners authorised in the year 1668, to fix the bounds of Virginia and Maryland, is hereby declared to be the true line of boundary between the two States, on the Eastern Shore of the Chesapeake Bay; and that the true divisional line across Chesapeake Bay is a straight line from Smith's Point, at the mouth of the Potomac, to the southernmost angle of the body of land defined by the said Commissioners as Watkins' Point. 3.—That the northwestern line of this State is a line commencing at the Fairfax Stone at the head of the north branch of Potomac River, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by the Commissioners appointed by the States of Maryland and Virginia. 4.—Makes an appropriation to complete

the survey and record of these lines. And this was the end of the Joint Commission of 1858.

Maryland, by the compact of 1785, made at "Mount Vernon," the home of Washington, and probably under his supervision, conceded everything that Virginia claimed or requested as to riparian rights on the Southern Shore of the Potomac; with common fishery in its waters; and surrendered her unquestioned right to Cinquack as the starting point of her charter for the Eastern Shore, and adopted Smith's Point instead. And finally, in 1852, by her formal Act, as we have shown, she proposed to surrender, as she supposed, the only remaining possible subject of boundary controversy between her and her elder sister, (which proposition was not responded to for six years,) and when at last it was supposed to be cordially accepted, it came to the unfortunate end we have above indicated.

We need not mention the more recent efforts for the adjustment of this boundary controversy. We had hoped that a calm and dispassionate review of the past history of the controversy would enable our Virginia friends and ourselves to come to an agreement. And we must confess our deep regret when, at the conclusion of their elaborate "statement," we were informed that "Virginia claims the river Potomac to the left or north bank, on the Western Shore; and to the Scarborough and Calvert line, on the Eastern Shore of the Chesapeake from *Point Lookout*, to the extremest part of the westernmost angle of Watkins' Point."

The Maryland Commissioners are compelled to say that outside of the statement of the Virginia Commissioners, they have found no evidence that *the State of Virginia* has ever set up any such claim. On the contrary, they find that in her Code of Laws, enacted by her General Assembly in the year 1849, the first "Title" is, "Of the jurisdiction of the Commonwealth;" and the first chapter under that title is, "of the territorial limits of Virginia, nature of the compacts with adjoining States, and the surveys, charts and map made by authority of the State, of its territory." The 7th section

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is entitled "Compact and boundary between Virginia and Maryland;" recites the making of the compact at "Mount Vernon," in Virginia, in 1785, and the confirming of it in 1786, declares "that the said compact remains obligatory except so far as it may have been superseded by the provisions of the Constitution, since formed for the United States; and it shall be faithfully observed and kept by this government and all its citizens, so far as may not be incompatible with the said Constitution." It then incorporates at length the seventh, eighth, ninth, tenth and eleventh sections of the compact. In the tenth section the boundary across the Chesapeake is described as "the line of division from the south point of Potomac River (now called Smith's Point) to Watkins' Point, *near the mouth of Pocomoke River*." The second edition of this Code, published by the State in 1860, contains the above mentioned "Title," "Chapter" and sections, in the same words. A note to the eleventh section refers to the said Virginia Act of 1858, and to resolutions adopted by the Virginia Assembly of 1860, providing for marking the boundary line between the two States, "*which runs from Watkins' Point, on the Eastern Shore, to the Atlantic Ocean*," but there is no mention of a claim to "the river Potomac, or to the north bank," or to start from *Point Lookout*, to run the line to Watkins' Point. On the contrary, further, at the same session of 1860, a report of a Committee complains of a decision of a Maryland Court, in the case of the Washington Aqueduct Company, and the Great Falls Manufacturing Company, to the effect, "That Maryland included within her chartered limits not only the bed of the Potomac River to low-water mark on the further side, but to the bank beyond, excluding the possession of any riparian rights of the State of Virginia." If this was intended to assert anything more than the historical fact, anterior to the compact of 1785, the committee justly concluded that "an acquiescence upon the part of Virginia in said decision, would impose upon her a submission to a violation of rights on the Potomac River, solemnly received by the compact of 1785, and asserted emphatically in the Constitution;" and the Assembly properly

resolved to have Virginia rights defended by her Attorney General in the rehearing of the said cause.

It will be seen that the riparian rights thus claimed by Virginia are fully recognized and provided for by the line first proposed by the Maryland Commissioners, as stated at the conclusion of "THE MARYLAND STATEMENT."

5th.—The Virginia Commissioners accompanied the Maryland Commissioners to the rooms of the Maryland Historical Society, and inspected an ancient map of Maryland, which (says a label upon it), "There is reason to believe, was published in London in 1695." It is entitled, "A Map of Virginia, Maryland, Pennsylvania and east and west New Jersey, by John Thornton, at the Platt in the Minories, and by Will Fisher, at ye Postern Gate, on Tower Hill, London." On this map the divisional line between Virginia and Maryland runs from Smith's Point, at the mouth of the Potomac, across the Chesapeake Bay, by a due east course, to Watkins' Point, and continues east, over Pocomoke Sound, to the east shore thereof, and thence east across the peninsula to the ocean, by a double line of trees, just as is shown on Herrman's map of 1673, leaving Smith's Island entirely in Maryland. The general features of this map were admitted by the Virginia Commissioners to be remarkably correct.

6th.—Mr. Jones referred to a map of Accomack county, Virginia, which he examined, during the past summer, in the Clerk's Office at Drummondtown, where it is preserved as one of the public records, and of which he exhibited a written description, viz: "The map is about seven feet, eight inches, by eight feet, and is entitled, "Accomack county." "Surveyed and drawn under the direction of John Wood, 1820." "Scale of 200 poles to the inch." The Virginia Islands in the Chesapeake Bay and Tangier Sound, delineated upon the map, are named, and are shaded the same color as the rest of the county to which they belong, viz: "Fox Islands," "Watts' Islands," and "Tangier Islands." There is a large vacant space on the map north of Tangier Islands, *but no part of Smith's Island is included in this map*, nor any men-

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tion that any part of it was claimed, in 1820, as part of Accomack county. The certificate in the margin of the map contains courses and distances and calls described on the map, to wit: "Survey of Accomack county, beginning at Sandy Point on Occohannock Creek, thence

North, &c., to Craddock Creek.

" " Nandua Creek.

" Butcher's Creek.

" Pungoteague Creek.

" Boggs' Creek.

" Matchatauk Creek.

" A Small Creek.

" Back Creek.

" Chersonessex.

" Island Bay.

" Deep Creek.

" Doe Creek.

" Hunting Creek.

And thence course

No. 70. N. 44¼°, E. 433 poles to Guilford Creek.

71. N. 23¾°, W. 1020 poles to Masongo Creek, (Syke's Island.)

72. Thence N. 85°, W. 1145 poles.

73. Thence N. 67¾°, W. 2130 poles to Pocomoke Bay.

74. Thence S. 78°, W. 635 poles.

75. Thence N. 30¼°, W. 1188 poles to the Maryland line at Watkins' Point.

76. N. 85¾°, E. 11,000 poles—Maryland line.

77. S. 33¾°, W. 320 poles to Long Point.

78. S. 84¼°, W. &c., &c.," south, down the Chincoteague Bay shore, to the line leading to the beginning.

From Long Point the courses of survey follow the Chincoteague Bay shore on the main land.

"All the distances around the county—139 miles—1633 yards." The 76th course, "North 85¾° east, eleven thousand poles, Maryland line," runs from a point upon the An-

namessex Marsh, on Tangier Sound, a short distance north of Cedar Straits; crosses the point of marsh to Pocomoke Sound, traverses the entire length of Pocomoke sound to William's Point, crosses the narrow point of marsh at William's Point, and then crosses Pocomoke River; and thence across the peninsula to the Atlantic Ocean; making the divisional line between the two States a right line from the beginning as above described, north eighty-five degrees and forty-five minutes east, eleven thousand poles to the Atlantic Ocean. Gen. Wise said that the map was utterly erroneous and unreliable. To which Mr. Jones replied that it was made under the provisions of the Virginia Acts of 1816 and 1817, "to provide an accurate chart of each county, and a general map of the territory of Virginia, one copy of the chart of every county was to remain with the clerk of the County Court for the use of the county, and another copy was to remain in the office of the Board of Public Works." Mr. Jones admitted that a line run north 85¾° east, from the point indicated, near Cedar Straits, as *they* and the Annamessex Marsh, north of them, are *now* correctly located by the U. S. Coast Survey, to the ocean, would now fall south of the Calvert-Scarborough line across the peninsula, as run by Michler and De La Camp.

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All the existing maps of Maryland and Virginia before the coast survey was made, located Annamessex Marsh and Pocomoke Bay much too far north; so much so, says Col. Lee, in his report in 1859, "as in some degree to conceal the want of conformity to the charter; as upon these maps the present boundary between Worcester, Maryland, and Accomack, Virginia, if produced westwardly from Pocomoke River to the Chesapeake Bay, would pass for almost the whole distance over the northern portion of Pocomoke Bay."

It was doubtless upon some of those erroneous maps, that Surveyor Wood, in 1820, after having ascertained by his survey, that the Calvert-Scarborough line ran north 85¾° east, produced it westwardly from Pocomoke River for almost the whole distance over Pocomoke Bay to Tangier Sound,

across the end of the marsh, which he calls Watkins' Point at Cedar Straits; and having thus ascertained by plotting, and not by actual survey, the beginning of the line, as it was then understood to be, he described it on his map as running from that point of beginning north 85¼° east, to the ocean.

On all the maps which we have seen of Virginia and Maryland, from the map in Lord Baltimore's pamphlet in 1635, to the present time, with one exception, "Watkins' Point" is represented as south of Little Annamessex River, and on many of them at the end of the land at Cedar Straits. The one exception is a map on a large scale in the Virginia State Library at Richmond, which is thus described: "Map of the State of Virginia, constructed in conformity to law, from the surveys authorized by the Legislature and other original and authentic documents by Herman Boye."—1825. "Corrected by order of the Executive, 1859."

"Memoranda relative to the plan, materials and construction of this map. The materials consist principally of the county maps, nearly all executed under the direction of the late John Wood; the surveys made at different periods for the Board of Public Works by the engineers; the surveys in the archives of the Executive Department, embracing nearly all the boundaries of the State, principal rivers and chains of mountains, besides several leading roads; sundry maps and charts made for the U. S. Government, together with N. S. Tanner's maps of the adjoining States, and various other approved documents," &c.—(Specifies Mason and Dixon's line and several other surveys.)

No divisional line is indicated across the Chesapeake Bay on this map, nor is there any such line indicated across the Eastern Shore Peninsula. There is nothing on this map to show where the Calvert and Scarborough line, or any part of it, ran; not even the well known marked line between Worcester county, Maryland, and Accomack county, Virginia, unless the words "Old Chimney's," on the east shore of the Pocomoke River, are intended to indicate the beginning of

that line. The words "Watkins' Point" are placed north of the mouth of Little Annamessex River, opposite "James' Island," which is indicated as the terminus of a railroad, for which, possibly, there might have been an experimental survey, but no road was ever built there. The terminus of the Eastern Shore Railroad is upon Somers' Cove, on the south side of Little Annamessex River.

We had hoped, on our visit to Richmond in November, 1872, to have found a copy of the map of Accomack county, required by law to be kept in the "office of the Board of Public Works," but we were informed it was not there. Finding that the State map of 1825 had been constructed "principally from the county maps, nearly all executed under the direction of the late John Wood," by whom, as we have shown, the map of Accomack county was made, we were desirous to see how Watkins' Point and the divisional line across the peninsula of the eastern shore were located on the original map of the State in 1825, before it was corrected in 1859, by order of the then Executive, Governor Henry A. Wise. But we were unable to find a copy of the original map. Having since learned how the line is located on the map of Accomack county, we presume that the same location was originally transferred to the State map. From a note on page 68, Virginia Code, 1860, we learn that the legislature of that State, by a resolution in 1853, for the purpose of enabling the Board of Public Works to improve the map of Virginia and ascertain her true boundaries, authorized the Board to purchase new plates; but the old plates having been found with the engraver, with whom they had been left for safe keeping, "The Governor authorized all the corrections made by the coast survey, and by the formation of new counties and other necessary alterations, to be made in these plates, and a new edition of the State map has been published therefrom, 1860." The removal, upon the new map, of the name, "Watkins' Point," from the point at or near Cedar Straits, several miles north, to James' Island, was doubtless made in consequence of the prolongation westward of the Calvert-

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Scarborough line to Tangier Sound, *across* the body of land described in their agreement as Watkins' Point, as run by Michler under the direction of Commissioners McDonald and Lee, in 1858, to ascertain where the prolonged line would strike the sound. The body of land called a "a point of land made by the north side of Pocomoke Bay and the south side of Annamessex Bay," by Calvert and Scarborough, is described in "the Maryland statement" as extending nearly twenty miles from south to north, and about fifteen miles from west to east; that is, from Watts' Island south to Big Annamessex River north, and from Tangier Sound west to Pocomoke River east; or, if considered as ending at Cedar Straits, about 15 miles from south to north and 15 from west to east. In the "Virginia statement" it is described as "about ten miles in length," and "an average width of from five to seven miles." Is there any other "*point*" of such extent upon the Chesapeake Bay? And does not the ambiguity in the description of the Calvert-Scarborough line arise from calling a body of land of such dimensions a "point?" The location of Watkins' Point at James' Island has not been followed by map-makers elsewhere. There is in the State Library at Richmond, "Colton's New Topographical Map of the States of Virginia, West Virginia, Maryland and Delaware, and portions of other adjoining States, published at New York, 1868." The only part of a divisional line between Virginia and Maryland on this map, is that distinctly marked between Worcester county, Md., and Accomack county, Va., from the Pocomoke River east, to the Atlantic Ocean. Watkins' Point is marked on this map on the land between Pocomoke Sound and Little Annamessex River.

But in view of the whole case, the ultimatum of our Virginia friends was, to start from a point in the water, at the mouth of the Potomac River, at the intersection of the meridian of Point Lookout and the 38° of north latitude, (a point about two miles south of Point Lookout, and eight miles northwest of Smith's Point,) thence to run on the 38th

parallel across Chesapeake Bay, and across Smith's Island, to low water mark on the east side of that island.

It was impossible for us to agree to that line for many reasons. Besides being a beginning purely arbitrary, and in deep water, where no monument of boundary could be located, the proposed line would take away from Maryland about 1,500 acres of land and marsh, on Smith's Island, part of it thickly settled, and, as to one thousand acres of it, granted by Maryland in 1679, and as to the residue granted before that date, and all held by Maryland titles, in regular succession, from that time to this. Other objections to it will be hereinafter stated.

The line along the Potomac River is described in our first proposition according to our construction of the compact of 1785, and as we are informed, is according to the general understanding of the citizens of both States residing upon or owning lands bordering on the shores of that river, and also in accordance with the actual claim and exercise of jurisdiction by the authorities of the two States hitherto. Since the retrocession of the county and town of Alexandria to Virginia, by Congress in 1846, the Potomac is the dividing line between Virginia and the District of Columbia. The territory of the District remaining under the jurisdiction of the United States since 1846, was ceded by Maryland to the United States after 1785. Whatever rights or jurisdiction over the Potomac River, Maryland held after the compact of 1785, passed to the United States by that cession. To the extent of the limits of the District of Columbia upon the Potomac River, any question of jurisdiction over the river, or of riparian rights therein, which may arise, must be adjusted between the United States and the State of Virginia, or between individual owners of land bordering on the river.

The line proposed by the Virginia Commissioners, on the Eastern Shore, as their ultimatum, would exclude the citizens of Somerset county, residing in Annamessex and on the Pocomoke Sound, from the right to take oysters in those waters, which they have enjoyed from the first settlement of

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that part of Maryland, without interruption or question from the authorities of the State of Virginia, until within a few years past. It is a right indispensable to them, and we had no alternative but to decline the proposition, and to report to the General Assembly our inability to execute the trust committed to us. Our final proposition is, in our judgment, in accordance with the clear rights of our State, and the true meaning of the declaration of the General Assembly, contained in the Act of March, 1860, chapter 385. That act declares,—the line established by the agreement of the Commissioners authorised, in the year 1668, to fix the bounds of Virginia and Maryland, to be the true boundary between the two States on the Eastern Shore of the Chesapeake Bay, and that the true divisional line across the Chesapeake Bay is a straight line from Smith's Point, at the mouth of the Potomac, to the southernmost angle of the body of land defined by the said Commissioners as Watkins' Point. The description of Watkins' Point by the Commissioners, made the waters of Pocomoke Sound, its southern bounds, and Watkins' Point, and the sound and river, extend certainly as far as opposite to the beginning of the Calvert-Scarborough line on the east shore of the river. The line easterly from that beginning ran *from* Watkins' Point, leaving as the charter and the agreement both required, *all Watkins' Point in Maryland*. Virginia being proprietor of the southern shore of Pocomoke Bay, and Maryland, proprietor of the northern shore; the channel of the bay and river became the boundary line between the two provinces and States, in the absence of any grant or call to the contrary, as in the case of the Potomac by Lord Baltimore's charter. So Maryland having granted the land called Plain Harbor, bounded on the south by Cedar Straits; and Virginia having granted Fox Island, bounded on the north by the same; each State owns to the centre of the straits: there being no channel, but merely a shallow flat between Plain Harbor and Fox Island. The equal right of citizens of Maryland to take oysters in the Pocomoke and Potomac Rivers, was expressly

recognised by the State of Virginia in the most solemn form by her laws. Hence the Code of Virginia enacted in 1849, title 29, section 12, declares: "if any person other than a citizen of this State, shall take oysters or terrapins in the waters thereof, or in the rivers Pocomoke and Potomac, he shall forfeit two hundred dollars. But this section shall not extend to a citizen of Maryland taking oysters or terrapins in the said mentioned rivers." Maryland, by the compact of 1785, having agreed that "the right of fishing in the Potomac River shall be common to and equally enjoyed by the citizens of both States; the provision of the Virginia law, first enacted in 1846, was but a just recognition of the equal rights of the citizens of Maryland in the waters of the Pocomoke. The Virginia law was amended in 1850, '51; and in the Code of Virginia, 1860, title 29, section 22, page 502, it is thus enacted: "If any person other than a citizen of this State shall take oysters or terrapins, or plant oysters in the waters thereof, or in the rivers Pocomoke and Potomac, he shall forfeit five hundred dollars. But this section shall not extend to a citizen of Maryland, taking oysters or terrapins in the said mentioned rivers." Thus stood the law in 1860, and for several years thereafter. We are not informed at what session of the Virginia Assembly it was changed, or of the reasons which induced the change. Probably, like the Maryland Assembly of 1852, in regard to the Fairfax Stone, the Virginia Assembly did not recall, at the moment, the relations of the two States to the rivers Potomac and Pocomoke, as boundaries between them, and mentioned together in the compact of 1785. Maryland conceded the common of fishery in the Potomac, without any mention of similar right in common in the Pocomoke. Probably very little was known at that time of the Pocomoke River, by the Commissioners of the two States, none of whom were residents of the Eastern Shore. But in 1846, when Virginia deemed it expedient to restrict to her own citizens the right to take oysters and terrapins out of the waters of the Pocomoke, she did not overlook the rights of citizens of Maryland to the equal enjoyment of that privilege.

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No compact of boundary defining the limits of the jurisdiction of each State in Pocomoke Sound or River, has been made by the two States. In such case, said Chancellor Bland, in Binney's case, 2d Bland 99, "A common use of a river flowing between coterminous States, is presumed, unless, as in the case of the Potomac, the contrary can be shown." But if it is deemed expedient now to define the limits of separate jurisdiction in the Pocomoke, we submit that the channel is the natural and legal boundary. The line from Smith's Point to Cedar Straits, described in our first proposition, may be distinctly marked by visible monuments; one, on the line in Old Horse Island Straits, south of Shanks' Hummock, where the water is but a few feet deep, and distant about eight miles from Smith's Point light; another, at the centre of Cedar Straits, at the end of the right line from Smith's Point, about five and a half miles from the former. These could be seen on either side, from a vessel passing between them up or down the Chesapeake Bay, or Tangier Sound. A right line over the flats, and shallow water, from the last mentioned monument to the nearest part of the channel of Pocomoke Sound, would reach the channel very near United States Buoy, No. 4, as located on the map of the southern boundary of Maryland, made by John De La Camp in 1860, and published by the authority of the Executive of Maryland, under the direction of Colonel Thomas Lee, the Maryland Commissioner, in 1858–9. The channel for a considerable distance up the sound is indicated by other buoys, and might be indicated by other marks to be agreed upon by the two States.

We are informed that within a few years past, four or five oyster-packing houses have been established upon and near East Creek, on the Maryland shore of Pocomoke Sound, furnishing a convenient, ready and profitable market to the citizens of both States for all the oysters taken in the sound. These packing establishments are within convenient distance of a depot on the Eastern Shore Railroad, by which the oysters are daily shipped to the northern markets. This home-

market, we are told, has created a community of interest and restored harmony and good feeling to the citizens of the two States bordering on the sound, who had become somewhat alienated by the attempts of some subordinate Virginia officials to exclude Marylanders from taking oysters in the sound. And there are many reasons for restoring and adhering to the policy proposed to be established by compact, in our first proposition, viz: "The right of fishing and taking oysters in Pocomoke Bay to be common to the citizens of both States, subject to concurrent regulation by the two States." This is most just, convenient and practicable. The citizens of the two States lived in peace and harmony, and took oysters in places most convenient to them, without any regulation, by law, until 1846, and from 1846 until since 1860, as we have shown, their right in common was recognized by Virginia law. It is the same policy which has ever been observed in regard to the Potomac River, and which was perpetuated by the compact of 1785.

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Virginia and Maryland are bound together by too many ties of kindred, sympathy, common interests and glorious memories, to allow this boundary controversy to interrupt their friendly relations.

It is a singular fact, connected with the controversy about the boundary line on the Eastern Shore, that it originated, not between Virginians and Marylanders, but between Marylanders themselves. More than thirty years ago, Maryland enacted a law restricting the taking of oysters in her waters, to her own citizens, and prohibiting dredging for oysters in her waters, under penalty of forfeiture of the vessel, and heavy fine of the captain and crew. Jurisdiction was conferred upon justices of the peace, with right of appeal to the County Court. In the execution of this law, several vessels were seized on a charge of dredging for oysters in Maryland waters, in Tangier Sound, and on trial before a justice of the peace, the captains and crews were found guilty and fined, and the vessels adjudged to be forfeited to the State. On appeal in one or more cases, on trial before a jury, the fact of

dredging was denied, and the fact of being "in Maryland waters," at the time was also denied. On the trial of these issues before a jury, there was much conflict of testimony. All the maps and charts at that day marked Watkins' Point at or near Cedar Straits. Then there was evidence of traditions, as we are informed, among the old people, some testifying that the traditional line between the two States was from Smith's Point by Cedar Straits, to Chincoteague Island and Atlantic Ocean; and others, that the boundary crossed Smith's Island. The verdict was for the appellant, and the judgment was of course reversed, and the vessels and fines released. The continued uncertainty and conflicting testimony of witnesses, as to where the boundary was, led to the passage of the Act of March 29th, 1852, chapter 60, proposing to Virginia the appointment of Commissioners to ascertain the true location of the line from Smith's Point to the Atlantic Ocean. At the same session was passed the Act of May 27th, 1852, Ch. 275, proposing to Virginia the adjustment of the western boundary. But as we have seen, Virginia did not respond to these propositions until 1858; and as we have shown, the joint commission ended without the establishment of either of the proposed lines by the two States. The western boundary line remains to be finally adjusted between the States of Western Virginia and Maryland.

It was in reference to the claim of Maryland to the territory between the south and north branches of the Potomac River, that McMahon, in his history of Maryland in 1831, suggested that Maryland might enforce her right against the Commonwealth of Virginia, by a resort to the Supreme Court of the United States. But as we have seen, Maryland did not adopt that suggestion. We find in the published report of the Virginia Commissioners, through the Governor of that State, to its General Assembly, in December, 1872, a suggestion upon the existing boundary controversy, in the following terms: "If not adjusted by the Commissioners, most important interests of the State require that she shall

resort to the Supreme Court of the United States. That will require at least the same amount of appropriation of $10,000 to begin with, and ten times that amount may well be expended to save the State's interest in the riparian rights of the Potomac River, in about 50 square miles of land on Smith's Island, and south of the Little Annamessex River, and north of the Pocomoke Sound, on the main; and in about 300 square miles of oyster beds, in the Chesapeake Bay, and in Tangier and Pocomoke Sounds."

After giving statistics of the oyster trade of "the town of Crisfield, exactly on the Calvert and Scarborough line," it is further suggested, that "the stakes in this boundary question, therefore, are worth, on the whole line in dispute, too many millions of dollars to be lightly relinquished or to be neglected."

We are informed that the General Assembly of Virginia did not make any favorable response to these suggestions. And we venture to express the hope that Virginia and Maryland will not ultimately find such resort inevitable. Not that such resort would or could interrupt or impair their friendly relations, but among other undesirable incidents, the inevitable delay attending such resort, would render it inexpedient. We have before us the experience of Rhode Island and Massachusetts, in a similar controversy before that high tribunal, commenced in 1832, as reported in 7th Peters S. C. Reports, and extending through several successive volumes of Peters, and finally ended in 4th Howard S. C. Rept., in 1848.

In response to a suggestion made at our first joint meeting at Washington city, of such a possible resort, in case of the inability of the two States to adjust the controversy by agreement, one of the Maryland Commissioners, among other objections, referred to the long pending case of Rhode Island against Massachusetts, and suggested, as far preferable, a reference by the two States of the matters in controversy to the arbitrament of one or more distinguished citizens of some of our sister States. And in returning unexecuted, to

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the General Assembly, the trust committed to us, we beg most respectfully to suggest, that Maryland propose to Virginia the reference of the controversy to the Governors of the two States, with power to them, in case of disagreement, to call in an umpire, whose decision shall be final.

In conclusion, we herewith submit, as part of our Report, the "statements," on the part of the Virginia and Maryland Commissioners, respectively, herein referred to. We also append a copy of the Report of Mr. Boyle, made in 1824.

The Maryland "statement" will be found to contain a summary of historical facts connected with the several boundary controversies from their origin. Many of the documents have been copied at length from manuscript Colonial Record Books, in order that their purport may be fully estimated. For convenience of reference, a condensed abstract of the "statement" is herewith respectfully submitted.

We have the honor to be, with high regard,

Your Excellency's obt. servts.,

LEVIN L. WATERS,
WM. J. AYDELOTT,
ISAAC D. JONES,
Commissioners, &c.

BALTIMORE, December 30th, 1873.

ABSTRACT OF THE MARYLAND STATEMENT.

The Maryland statement opened with a reference to a question, which had been raised as to the accuracy of the Latin version and English translations of the charter of Maryland as contained in Bacon's Laws, and it was insisted that a careful comparison with all the other copies of the charter which had been found in the British records, show that there was no substantial difference between them. The translation by Mr. Tomlins, London attorney and record solicitor for the Virginia Commission, of the charter in Latin, as found in the rolls office in London, is given as confirming this conclusion.

The first question considered is, "Where was Watkins' Point?"

It is described in the charter as a "promontory," "headland" and "place," beside the Chesapeake Bay, near the river of Wighco, (which is shown from Smith's map and history to have been an abbreviation of Wighcocomoco,) now known as the Pocomoke. The point, as it existed at the date of the charter, June 20th, 1632, has been washed away, but its locality at that time must have been well known to the Virginians. Smith had explored the bay and river in 1608, and had published his history and map in 1612 and 1629; and as early as 1622, there were seventy-six inhabitants settled upon the Eastern Shore of Virginia. The decision of the Privy Council in 1633, sustaining Lord Baltimore's charter against the remonstrance of the Virginians, and also that, in the controversy with Clayborne and others in 1638, are stated in full, the latter having called forth a proclamation, dated October 4th, 1638, by the Governor and Council of Virginia, in the name of the King, forbidding Virginians to trade with the Indians within the limits of Lord Baltimore's charter without his license, and defining said limits to be north of the Onancock River on the Eastern Shore, and north of Cinquack or Great Wicomico River on the Western Shore. It is argued that this proclamation must have been well known to the Virginians, and that its accuracy in stating the limits of Maryland having been unquestioned during the life of Charles the First, and during

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the usurpation of the government of Maryland by Clayborne and Bennett, under the Parliament of Cromwell, and remaining unquestioned even down to the year 1663, it must have been understood by the Virginians at that time to have correctly described the limits of Maryland. Lord Baltimore, in 1634 and in 1635, published a pamphlet with a translation of this charter and a map of his province, showing Watkins' Point to be a neck of land, being the north headland of the river Wighco, where its waters were discharged into the Chesapeake Bay; and it is argued from the limits described in the proclamation of 1638, that the neck of land must, at that time, have extended so far south as to have been west of Onancock River, and that an east line from that point to the ocean would have passed along or near that river. From existing facts and tradition it is argued that that headland was subsequently broken into the islands called Fox's and Watts' Islands, and that Watkins' Point was the southernmost end of what afterwards became Watts' Island, at the mouth of the Pocomoke River. The proclamation is found on record in the Maryland Council proceedings, and is referred to on several occasions as correctly defining the Maryland limits, viz: in an act of the Maryland Assembly in 1650; in instructions from Lord Baltimore to Governor Stone in 1651 and in 1656, the latter being accompanied by a copy of the proclamation from a copy in his Lordship's possession, attested by Richard Kemp, Secretary of Virginia, when it was issued.

The instructions of Lord Baltimore to his Governor, referred to the proclamation as correctly defining the Maryland bounds, and urged his Governor to grant lands on favorable terms to those who would settle upon them, on the Eastern Shore adjoining to Virginia. But for ten years the efforts to this end had failed. In 1660 the spirit of intolerance embodied in an act of the Virginia Assembly, which expelled the Quakers from that colony under severe penalties, compelled them to seek a home and refuge in the Maryland province. The persecuted Quakers of the Eastern Shore of Virginia petitioned Governor Calvert to afford them facilities for settling in Maryland, and in compliance with their petition, in November, 1661, he commissioned Col. Scarborough, Randall Revell, and John Elzey, then residents of the Eastern Shore of Virginia, to grant lands on the Eastern Shore of Maryland to those Virginians who wished to come with their families into Maryland. Under this commission settlements were made at Annamessex and Manokin before May, 1662. At that time the commission having expired, it was renewed to the same persons, to continue until recalled. A

new commission was issued February 4th, 1663, to Elsey, Revell, and Stephen Horsey, who had become residents of Maryland. Scarborough was doubtless left out in consequence of a letter he had about that time written to Mr. Revell, (who had settled upon Manokin River,) claiming that place as belonging to Virginia.

On February 23d, 1663, Mr. Elzey, being in Accomac on business, was arrested by Colonel Scarborough, on a claim for dues and submission to the King for his land at Manokin on the pretext that it was formerly in Smith's map, called Wicocomico River. In September, 1663, the Virginia Assembly passed an act declaring "Watkins' Point to be the north side of Wicocomico River, near and on the south side of the straits Limbo, (since known as Hooper's Straits,) opposite Patuxent, according to Captain Smith in 1608." The Maryland statement avers that this was so palpable an error that it was subsequently abandoned. It afforded, however, a pretext for Scarborough, in October, 1663, to invade Annamessex and Manokin with an armed force, with the purpose to compel submission to the government of Virginia.—He was reminded "by the settlers at Manokin of Lord Baltimore's claim to that place, and all other places to Anancock, to which he replied, that whilst the erroneous proclamation was uncontrolled that declares Anancock to be Maryland's southern bounds, it might be so received, but since occasion made the government of Virginia not only reverse that proclamation, but also by this present Act of Assembly the certain bounds of Lord Baltimore's patent was declared, and if the Lieutenant had aught to say, he was referred by the act to persons and place." Governor Calvert, in a remonstrance to Governor Berkeley, of Virginia, against Scarborough's conduct, charged him with outraging by blows and imprisonment the people he had himself seated in Maryland, under Governor Calvert's commission, and contrary to his certain knowledge of the bounds of Maryland, and also with attempting, without authority, to mark a tree upon a point of land 30 miles to the northward of Watkins' Point, in Maryland.

The Maryland Records show that after Scarborough and the Virginia Assembly had raised a question for the first time, in 1663, as to the true location of Watkins' Point, in every official document issued by Lord Baltimore and his Governor and Council, in which Watkins' Point was named, it was described as "the north point of the bay into which the river Wighco (formerly called Wighcocomoco, afterwards Pocomoke, and now Wighcocomoco *again*) doth fall exclusively." It is so described for the first time in a

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commission to Wm. Coulbourne as Lieutenant, in March, 1664; in another to Stephen Horsey, Captain Thorne and Mr. Bozman, in May, 1664, to grant lands, &c., and in letters patent, August, 1666, erecting Somerset county, "bounded on the south with a line drawn from Watkins' Point, (being the north point of the bay, &c.,) to the ocean on the east," &c.

After a very full and thorough examination of the question, the Maryland statement concludes that the most southern promontory of Pocomoke Bay at Watts' Island was formerly Watkins' Point, and that the Virginia proclamation of 1638, furnishes the most certain evidence of its former true location.

The next point considered is the Calvert-Scarborough line of 1668. It appears from the document issued by Governor Calvert, before referred to, dated 3d June, 1664, that in March of that year Governor Berkeley had authorized Colonel Scarborough, with one or both the surveyors, Cattlet or Lawrence, and with three others, to give a meeting to the Maryland Commissioners, at Manokin on the 10th May, 1664, but that Scarborough alone appeared, issued a proclamation, and attempted to mark a tree, &c., and that to Governor Calvert, in person, Governor Berkeley had disclaimed Scarborough's conduct in the invasion of Annamessex, &c., and that Governor Calvert sent a copy of his remonstrance against the subsequent acts of Scarborough and of the Virginia Assembly, by Chancellor Philip Calvert, to Governor Berkeley, and authorized Chancellor Calvert also "to treat and determine the said difference concerning Watkins' Point." But it was not until 1668, that Philip Calvert and Edmund Scarborough met upon the place called Watkins' Point. The first indication in the Maryland Records, that a divisional line had been run, is an agreement, dated 11th June, 1668, signed by Governor Charles Calvert, annexed to a list of lands patented by Virginia, that now fall in Maryland, giving the names of nearly thirty patentees who had obtained patents from Virginia for about thirty-three thousand acres of land between the Pocomoke River and the ocean, which, upon running the line agreed upon, were found to be in Maryland, and Col. Scarborough himself is twice named in the list as patentee of two tracts of 3,000 acres each. Governor Calvert agreed to issue Maryland patents for those lands, and fourteen days after the date of this agreement Chancellor Calvert and Col. Scarborough signed two agreements, one prescribing the terms upon which Maryland patents should be granted to the Virginia patentees, and the other describing the line of division agreed upon; both dated 25th June, 1668.

From their view of the place called Watkins' Point, they concluded it to be the point of land made by the north shore of Pocomoke Bay and the south shore of Annamessex Bay, *from* which point, so called, they "run an east line agreeable with the extremest part of the westernmost angle of said Watkins' Point over Pocomoke River, to the land near Robert Holston's, and *there* had marked certain trees, which are so continued by an east line running over Swansecute Creek into the marsh of the sea-side, with apparent marks and boundaries."

The construction of this agreement by the Maryland case is, that the Watkins' Point agreed upon was a body of land about twenty miles in extent from north to south, and about fifteen miles from east to west, the eastern boundary being Tangier Sound, and the western Pocomoke River; that the east line over Pocomoke River was not a line run *across* this Watkins' Point, *from* the extremest part of its westernmost angle as a divisional line, but the line was agreeable with, or corresponding with, or in the direction of, this angle; that if a line was actually run *across* this point, it was merely for the purpose of ascertaining the starting point at the Pocomoke River toward the ocean; that it is plain that no line was marked until it had reached the east shore of the river, where it run over the river *from* Watkins' Point, and that the only line run, marked and agreed upon on the land as a divisional line was from the marked trees near Holston's land to the ocean; leaving all Watkins' Point in Maryland, as the charter of Maryland required. In confirmation of this view, the fact is relied upon that on the prolongation of the marked line westward to Tangier Sound, no mark or tradition was found of any line ever having been run there before; that Virginia never before or since 1668, granted any land along the said line, or north or south of it, except Fox's and Watts' Islands, for which grants were made long after 1668, but that before 1668, Maryland had granted lands over which the line if run, must have passed, and other lands south of said line, and since 1668, all the then unpatented lands down to and including the point of marsh of 500 acres lying immediately north of Cedar Straits, have been granted by Maryland, and have been held to the present time under the unquestioned jurisdiction of Maryland as a part of Somerset county. It is further shown from the description in Smith's History, that the point of high land, formerly on Jean's Island, since washed away, and now claimed by the Virginia Commissioners as having been the western angle of Watkins' Point, was called by Smith's companions, who wrote a minute account of his explorations, "Point Ployer." It is

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further insisted, that either by mistake or design on the part of Col. Scarborough, then Surveyor General of Virginia, the line between Accomac and Somerset (now Worcester) counties, was run 5 degrees and 15 minutes north of east, instead of east, as the agreement asserts, which mistake was only found out in 1858, and that Maryland is entitled, in this adjustment, to have the error rectified.

That by this error Virginia obtained possession of 23 square miles, nearly 15 000 acres of Maryland territory. The relations of Lord Baltimore to Charles the Second, who then owned the unpatented lands of the Virginia territory, the perils threatening the eastern and northern parts of his province from the claim of the Duke of York, and the western bounds and the Potomac River, from the claim under "The Fairfax grant of the Northern Neck" of Virginia, by Charles the Second, combined to compel Lord Baltimore's assent to the demand of Scarborough. The pressure of circumstances compelled him ultimately to yield the Delaware territory, and fifteen miles of territory on his northern bounds, to William Penn's sons. The western boundary controversy over the territory between the north and south branches of the Potomac River, after having continued for over two centuries, was finally adjusted by the Act of Maryland of 1852, consenting to accept the Fairfax Stone, at the head of the north branch, as Maryland's western bound.*

The next question discussed is that relating to the *south-western boundary* line of Maryland. The charge by Colonel McDonald, Virginia Commissioner in 1860, that but for the gross departure of the Latin version of the Maryland charter in Bacon's Laws, from the copy in the rolls office, in London, no doubt could ever have existed but that the whole Potomac River to its northern shore, was within the limits of Virginia, is fully examined by comparing the copies of the charter obtained from the rolls office in London, by Colonel De Jarnette, with that contained in Bacon's Laws; and it is insisted, that the discrepancy consists in but two Latin words, which do not at all change the meaning of the sentence, and that the Latin versions, and all the translations into English, are of the same import, to wit: from the meridian of the first source of the Potomac River, tending towards the south to the further bank of the said river, and following the same in the direction towards which the western and southern coast looks, as far as to a certain place called Cinquack, near the

* The line was run and marked by Commissioners of the two States, 1858, but Virginia did not ratify the report, and the Line now requires the formal ratification of West Virginia.

mouth of the said river. Cinquack was, in fact, at the mouth of the great Wicomico River, about six miles south of the mouth of the Potomac. Upon this point, the statement cites Binney's Case, 2 Bland, 127, in which Chancellor Bland, in 1829, said: "The boundary called for in the charter of Maryland is from the first fountain of the river Potomac, thence verging toward the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack, situate near the mouth of the said river. To the full extent of this call for the right bank of the Potomac, Maryland has always held, and under that holding all the islands in the river have been granted by patent from the Land Office, or legislative enactments, or titles derived from this State."

It is admitted, that the exception from the quit-claim in the Virginia Constitution of 1776, (of all rights which might at any time have been claimed by Virginia, except the free navigation and use of the Potomac and Pocomoke Rivers, with the property of the Virginia shores and strands bordering on either of the said rivers, and all improvements which had been or should be made thereon,) to which Maryland agreed in the compact of 1785, modified to some extent, the limits contained in the Maryland charter. By that compact, Cinquack was given up as the starting point from the western shore across the bay, but by inevitable implication, the tenth section asserts that the line of division on the bay is from the south point of Potomac River, then and now called Smith's Point, to Watkins' Point, near the mouth of Pocomoke River. The Act of the Virginia Assembly of 26th March, 1858, provided for the appointment of a Commissioner, who, with a Maryland Commissioner, was empowered to trace and mark with suitable monuments the line from Smith's Point, at the mouth of the Potomac River, to the ocean. A similar power was conferred upon the Virginia Commissioners, under a resolution of the Virginia Assembly of 1867. It is therefore submitted, that Smith's Point is unquestionably the starting place from which the line across the Chesapeake must be run.

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This line is the next subject considered. The charter requires this line to be the shortest line to Watkins' Point. It is insisted, that the shortest line from Smith's Point reaches the south end of Watkins' Point, as described in the Calvert-Scarborough agreement, at Cedar Straits, on a tract of land called Plain Harbor, granted by Maryland in 1702, and bounded by said straits, and that the divisional line should run thence, by and with the Pocomoke River, to the Scarborough line, and with the Scarborough line to the ocean

Submitted

—corrected so as to run a due east course from the river to the ocean. Not only is the line from Smith's Point across the bay to Cedar Straits the shortest, and hence answers the call of the charter, but the stumps of trees in the water and marshes confirm the tradition that a neck of high land, in 1668, extended from Annamessex Marsh to where was the southern end of what has since become Watts' Island, and that this neck of land was the southern end of Watkins' Point, as described in the Scarborough agreement, and that the most western angle was at the north end of the neck of that land where the existing shoal west of the north end of Fox's Island indicates the former position of the high land, and a tradition is proved that the divisional line was said to have passed over the north end of what afterwards became Fox's Island. In confirmation of this line, it is shown that Maryland, after the waters had broken through the upper end of the neck into Pocomoke Sound, and formed Cedar Straits, granted the land north of these straits in 1702, and Virginia in 1699 and 1702, granted Fox's and Watts' Islands, south of them. In running this line from Smith's Point, and correcting the error in the original running of the Scarborough line, Accomac county would lose about fifteen thousand acres of land north of a due east line, but as the inhabitants on each side of the existing line naturally prefer remaining under the jurisdiction to which they have been accustomed, the Maryland case closes with submitting the following compromise line, viz: Beginning at low water-mark at the divisional line between the States of West Virginia and Virginia upon the southern shore of the Potomac River; thence following the said river, at low water-mark, to all wharves and other improvements now extending, or which may hereafter be extended, by authority of Virginia, from the said shore into the said river beyond low water-mark, and following the said river around said wharves and improvements to low water-mark on the southeastern side thereof; and following the said river in the same manner, down to the easternmost angle of Smith's Point, at the mouth of the said river, where it flows into the Chesapeake Bay; thence by a right line to the centre of Cedar Straits, upon Tangier Sound, near the southern end of Watkins' Point; thence by a right line, in a southeasterly direction to the channel of Pocomoke Bay or River, nearest to Cedar Straits; thence up, by and with the said channel to a point therein, opposite to the place on the east shore of said river, ascertained by M. De La Camp in 1867, as the beginning on said shore of the divisional line, run and marked by Calvert and Scarborough in 1668; and thence by and with said di-

visional line to the Atlantic Ocean. The right of fishing and taking oysters in Pocomoke Bay to be common to the citizens of both States, subject to concurrent regulations by the two States, as provided by the compact of 1785, in regard to the right of fishing in the Potomac River. The effect of this compromise would be to give up the claim of Maryland to the fifteen thousand acres of valuable land included in Accomac county by the said error in 1668, together with a wide extent of valuable oyster waters in Chingoteague Bay, while Maryland would receive in return a part of Smith's Island, "containing four or five acres of firm ground, mere sites for rude fishermen's huts," and occupied by five or six families, together with a few hundred acres of salt marshes, and a small area of oyster grounds.

I. D. JONES.

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THE REPORT OF JAMES BOYLE, ONE OF THE MARYLAND COMMISSIONERS, ON THE WESTERN BOUNDARY, IN 1824.

"*To the Honorable, the General Assembly of Maryland;*

Having been appointed one of the Commissioners to settle and adjust the western limits of this State, and the dividing line and boundary between this State and the Commonwealth of Virginia, it becomes a duty to make known to the Legislature the causes which prevented the Commissioners from proceeding to any examination which might eventuate in a final termination of the disputed territory.

When I arrived at Smith's Tavern, the place of rendezvous, the unexpected and mournful intelligence of the death of the late Chancellor Johnson first reached me; an event deeply to be deplored as a private loss or a public calamity. As the surviving Commissioners were from that place but a days journey from Fairfax Stone, which had been designated in the Act of Assembly of Virginia, as the place of beginning, it was deemed most expedient to visit it, and ascertain if this call would answer that of the Maryland Act, and if not, how far Fairfax Stone might be distant from "the most western source of the north branch of the Potomac River," which was the point of beginning specified in the Maryland Law. It was soon discovered that the difference between the two places of beginning, embraced a section of country about one mile in width, and thirty-six miles in length, which was deemed too important to be abandoned, unless under express instructions to that effect. The reasons which induced the Maryland Commissioners to terminate the business of adjustment will be found at length in copies of the correspondence herewith transmitted, marked A, B, C, D, E.*

I declined taking a meridinal line, because the transit instrument had been rendered useless, and I wished the State to express some opinion upon the point of beginning. If the Legislature of Maryland contemplate new-modelling their Law to meet the views of Virginia, it will be necessary to give to the Commissioners the power to summon and swear witnesses, and to vest a majority of the Commissioners with the power of the whole.

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*This correspondence I have not been able to find.—*I. D. Jones.*

If upon an investigation of the title, the State has, it should be found that the Act of 1818, Ch. 206, if acted under, will be an abandonment of the rights of Maryland to nearly an half a million of acres of territory, it may be considered fortunate that the phraseology of the Virginia and Maryland Laws, have essentially differed from each other. The only question for consideration is, whether the north or south branch is to be considered "the first fountain of the river of Pattowmack." In the consideration of that question, the charter granted to Cecil, Lord Baron, of Baltimore, bearing date at Westminster, the twentieth day of June, in the eighth year of Charles the Second,* the charter granted Ralph Lord Hopton and others, bearing date at St. Germains en Ley, the eighteenth of September, in the first year of Charles the Second, other letters patent to Henry, Earl of St. Albans, and others, bearing date the eighth day of May, in the one and twentieth year of the said reign, and other letters patent to Thomas, Lord Culpepper, bearing date at Westminster, the twentieth-seventh day of September, in the fourth year of James the Second, must be construed in strict connection. I do not consider it irrelevant to the subject, here to remark that properly authenticated copies of these charters are not to be obtained, either in Maryland or Virginia, and what appears strikingly strange, no copy which would be admitted as evidence by a tribunal properly constituted to decide this dispute, exists on this side of the Atlantic, of the original charter granted to Lord Baltimore, the adventurous and venerable founder of Maryland. These grants of the first, eighth and twenty-first, of Charles the Second, and the fourth of James the Second, contained, as is alleged, the disputed territory, to which Thomas Lord Culpepper became the sole heir, and whose right, if any he had, descended to his heir-at-law, Thomas Lord Fairfax, Baron of Cameron, who came into America, opened a Land Office, and made grants, but he, like Lord Baltimore, was prohibited from making grants in this portion of territory by a royal proclamation dated the seventh of October, 1763.

Thomas Lord Fairfax, Baron of Cameron, died, having devised his right to Denny Fairfax. About the time of the death of Lord Fairfax, the colony of Virginia having become an independant and sovereign power, asserted its right to this territory, founding its claim on the principle of Denny Fairfax being an alien, obtained possession of the records, documents and entries of the lands made by individuals in the Land Office of Thomas Lord Fairfax, removed the same

*A slip of the pen; he evidently intended to write "Charles the First."—*I. D. Jones.*

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to the City of Richmond and placed them in the keeping of the Register of the Land Office there, and commenced issuing warrants.

In the year 1796, or perhaps earlier, a company of gentlemen of whom John Marshall the present Chief Justice of the United States was one, purchased from Denny Fairfax the aforementioned devisee, all his claim, and the Commonwealth of Virginia, subsequently obtained the right of those gentlemen. The question still recurs to the phraseology of the original charters, and the location of the first fountain of the river Potomac. If the South Branch traced to its source, be the first fountain, then the Act of 1818, chapter 206, will be an abandonment of nearly an half a million of acres, a large portion of which is extremely and proverbially fertile.

The present line (as it is called by a vulgar error) between Virginia and Maryland, was laid down by Francis Deakins with a view to locate bounties of land to the war-worn veterans of the Maryland Line, and in a spirit of grateful remembrance for their services, he was expressly enjoined to avoid all conflicting title. This line is declared by the Legislature of this State in the year 1788, "to be far within that, which this State may rightfully claim as its western boundary; and that at a time of more leisure the consideration of the Legislature ought to be drawn to the western boundaries of this State."

This communication would have been made sooner, but the plat showing the distance between Fairfax stone, and the most western source of the North Branch, was not forwarded by the chief engineer until a few days since, and will be transmitted to the General Assembly by my worthy colleague, Col. Chambers, in whose possession it is.

I have the honor, gentlemen, to be,
with sentiments of high respect,
and consideration, yours,

JAMES BOYLE.

JOURNAL OF PROCEEDINGS,

(AT THEIR JOINT MEETINGS,)

Of the Commissioners of Virginia and Maryland to adjust the Boundary Line between those States.

ANNAPOLIS, MD., May 8th, 1872.

The Commissioners on the part of Virginia and Maryland, to wit: Hons. Henry A. Wise, D. C. De Jarnette and William Watts, on the part of Virginia, and Isaac D. Jones, William J. Aydelott and Levin L. Waters, on the part of Maryland, appointed by Acts of Assembly of their respective States to adjust and settle the boundary lines between the two States, met pursuant to agreement in this city on yesterday, the 7th inst., and held an informal meeting for the interchange of views.

This morning the Commission met again, and on motion of Mr. Aydelott, was formally organized by electing the Hon. D. C. De Jarnette, chairman, and Levin L. Waters as secretary.

The morning session of the Commission was occupied in the reading of reports by the Virginia and Maryland Commissioners to their respective Legislatures of 1872, and in the reading, by Gov. Wise, of an argument by Mr. Tazewell, of Virginia, for the purpose of presenting the claims of Virginia to the north bank of the Potomac as the true boundary between the two States; without concluding which, the Commission, at 3 o'clock P. M., took a recess for one hour to dinner.

The Commission re-assembled at 4 o'clock P. M., and Gov. Wise resumed the reading of Mr. Tazewell's argument. This having been concluded, the Commission was engaged in discussing the reports of Scarborough, Lee and McDonald, and in examining maps until a quarter before seven, at which hour the Commission took a recess until eight o'clock P. M.

The Commission re-assembled at eight o'clock, and were

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engaged until the hour of adjournment in the investigation and discussion of maps, charts, &c. The Commission, at 11 o'clock P. M., adjourned until to-morrow morning at 10 o'clock.

THURSDAY MORNING, May 9th, 1872.

The Commission met this morning pursuant to adjournment.

Mr. Jones, on the part of the Maryland Commissioners, offered the following:

"The Maryland Commissioners respectfully request the Commissioners of Virginia to furnish them, at their convenience, a written statement of the boundary line between that State and the State of Maryland, as claimed by them, with a statement of the facts, documents, maps and other evidence by which they claim the establishment of the said boundary, in order that the Maryland Commissioners may consider the same and reply thereto, with a statement of the Maryland case and claim as understood by the Maryland Commissioners."

This was objected to by the Virginia Commissioners, and in lieu thereof, Mr. Wise proposed the following:

"The Commissioners of Virginia and Maryland, to settle and adjust the boundaries between the two States, mutually and concurrently agree that the Commissioners of each State shall furnish the Commissioners of the other State, at the earliest convenience of both, with a written statement of the location of boundaries claimed by each; referring to any documents, maps or other evidence by and under which either State claims, but not confining either party to the evidence so adduced—the object being to furnish only the statement of the claim on either side. Each shall state the location of claim on the Potomac, and each shall designate what it claims to be the true Watkins' Point, or part of Watkins' Point, on the Eastern Shore, or what point is claimed to be the initial point of the line on the Eastern Shore, and what is claimed by each to be the course of the line on the Eastern Shore, with a reference to the evidence on which the claim rests." Which proposition was unanimously adopted.

The following resolution offered by Mr. Jones was adopted:

Resolved, That when the Joint Commission adjourn to-day, it shall adjourn to meet at Crisfield, on Wednesday morning, May the 22d instant.

On motion, the Commission, at two o'clock P. M., adjourned.

CRISFIELD, May 22d, 1872.

Pursuant to adjournment at Annapolis, Commissioners Wise, Aydelott and Waters met here this morning. Messrs. De Jarnette and Watts were detained by an accident to the steamer, and Mr. Jones, of the Commission, was prevented attending by urgent business detaining him at Philadelphia.

CRISFIELD, May 23d, 1872.

This morning the Commissioners having all assembled, the Joint Commission proceeded in the Maryland Oyster Police Steamer Leila, to Smith's Island, and visited a stone about three-fourths of a mile north of the residence of Johnson Evans, at Horse Hammock, and ordered the same to be taken up for inspection. All the Commissioners returned to Crisfield, except Gov. Wise, who remained at the Island from choice, to see to the removal of the said stone.

CRISFIELD, May 24th, 1872.

The Joint Commission left this place this morning in the Maryland steamer, and met Governor Wise on the Virginia steamer, off Smith's Island, who reported to the Commissioners that he had caused the first stone north of Horse Hammock to be taken up, and that it was lying on the marsh for their inspection, and that he had found two other stones within eighteen feet of each other, in the same thoroughfare where the first was found, near half a mile from Troy Island, and in and about forty or fifty feet from the edge of the marsh at Beaver Hammock, and showed on the Coast Survey chart where it was to be found. All the Commissioners, except Governor Wise, proceeded to the stones. He found the first stone lying on the edge of the marsh near its site. In attempting to break off a piece of it, the stone was broken in two pieces, which were put together and replaced in the position from which it had been taken.

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They also proceeded about two miles further up the thoroughfare, to the two stones, described and marked by Governor Wise, and found them as represented.

The Commissioners, at night, returned to Crisfield.

SATURDAY MORNING, May 25th.

Governor Wise and Mr. Waters being required to go to Princess Anne, and Mr. Aydelott desiring to go home, the Commission adjourned, to meet at Crisfield on Monday morning next.

CRISFIELD, May 27, 1872.

The Commissioners, except Mr. Waters, who was detained at home, met this morning at the Cove Hotel, in Crisfield, and proceeded to take the depositions of the following persons, to wit: Isaac Sterling, McKenney Laws, Abraham Jones, John Cullen and Benjamin Lankford, and adjourned to meet at Horse Hammock, on Smith's Island, the following day.

TUESDAY, May 28th, 1872.

The Joint Commission met, pursuant to adjournment, and finding they had no one on Smith's Island to administer oaths, they returned to Crisfield to procure a justice of the peace, and adjourned to meet at the same place again the next day.

WEDNESDAY, May 29th, 1872.

Pursuant to adjournment, the Commissioners met, and proceeded to examine the witnesses before Thos. K. Wheelton, a justice of the peace of Maryland, and took the depositions of the following witnesses: John Marshall, James T. Evans, David Tyler and Severn Bradshaw. The Commission adjourned to meet at Crisfield next morning.

THURSDAY, May 30th, 1872.

Pursuant to adjournment, the Commission met at the railroad office in Crisfield, and before the same justice of the peace, took the depositions of William Sterling, Michael Somers, Hance Lawson, William Nelson, and Thomas W. Dougherty. The Commission then adjourned to meet at Horse Hammock next morning.

May 31st, 1872.

The Joint Commission met this morning pursuant to adjournment, and before the same justice took the depositions of Francis Evans, Severn Bradshaw, Benjamin Bradshaw, Stephen T. Dise, Johnson Evans, and John Tyler. The Commission then returned to Crisfield and adjourned to meet again at Crisfield on Monday next, the 3d of June.

CRISFIELD, Monday, June 3d, 1872.

The Joint Commission met this morning pursuant to adjournment:

Present—Messrs. Wise and Watts, on the part of Virginia, and Jones and Waters, on the part of Maryland.—Absent—Messrs. De Jarnette and Aydelott.

The Commission proceeded to take the deposition of witnesses before Justice Whealton.

The deposition of the following witness was taken to-day: Henry Dize. And they also examined sundry patents, and adjourned to meet at Crisfield the next day.

CRISFIELD, Tuesday, June 4th, 1872.

The Joint Commission met this day at this place, pursuant to adjournment on yesterday. Present—Hon. I. D. Jones, Wm. J. Aydelott, Esq., Col. Wm. Watts, and Henry A. Wise, Esq., who proceeded to take the depositions of the following witnesses: Edward Tawes, Clement R. Sterling, and John Spence; and other witnesses failing to appear, the Commissioners proceeded in the examination of patents, and adjourned to meet at Smith's Island the next day.

CRISFIELD, June 5th, 1872.

The Joint Commission having adjourned on yesterday to meet to-day on Smith's Island to visit two stones—one at the mouth of a creek off "the Barns," another on the west side of the island off the shore of the upper part of Hog Neck, but the wind being very high, and rendering the work impracticable on the island they assembled to-day at this place. Present—Hon. I. D. Jones, Wm. J. Aydelott, Esq., Col. Wm. Watts and Henry A. Wise, Esq., and proceeded to read numerous patents of Virginia for lands at and near the

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divisional line of Virginia and Maryland, as therein called for, of which the following were read and noted, to wit: and they also proceeded to take the depositions of the following witnesses: John W. Evans and Charles W. Marsh. And thereupon adjourned to meet here at Crisfield to-morrow.

CRISFIELD, MD., June 6th, 1872.

Pursuant to adjournment, the Commissioners met at this place this day, and read the journal, and read and compared sundry copies of papers; and according to an understanding on yesterday, when Mr. Aydelott was present, they adjourned to meet at Baltimore, on Tuesday, the 3d day of September next. And before adjournment, it was unanimously ordered that John E. Mowbray be allowed [illegible] dollars a day for his services as Clerk to the Commission, in writing depositions and copying papers.

BALTIMORE, Oct. 1st, 1872.

The Joint Commission assembled in this place to-day.—Present—Hons. I. D. Jones, Wm. J. Aydelott and L. L. Waters, on the part of Maryland; and Hons. D. C. De Jarnette and Henry A. Wise, on the part of Virginia. Col. Watts being absent from sickness.

The Commissioners having failed to meet according to their appointment at Crisfield on the 3d of September, ult., the meeting was postponed at the instance of Gov. Wise, and agreed to by the Commissioners on the part of Maryland, until the 17th ult., and further postponed to this day.

Upon assembling, the Commissioners adjourned to wait the arrival of Col. Watts, who had telegraphed that he would be here this day. The Commission adjourned until ten o'clock A. M., next day, to await the arrival of Col. Watts.

BALTIMORE, Oct. 2d, 1872.

The Commissioners met to-day at Barnum's Hotel. Absent—Col. Watts. In pursuance of their previous resolution, they proceeded to hear the statements of the claims respectively of the two States. Mr. Wise proceeded on the part of Virginia, to state the claims of boundary made by

that State, and concluded. Whereupon, the Commission adjourned to meet to-morrow at ten o'clock A. M., to hear the statement on the part of Maryland.

BALTIMORE, Oct. 3d, 1872.

The Commission met this morning, pursuant to adjournment. Absent—Col. Watts.

Mr. Jones proceeded to read a written statement of the claims of Maryland, and after being partly heard, Col. Watts arrived, when the Commission paused for him to be informed of what had been done. Whereupon, Mr. Jones continued his statement, and not having finished reading it, when the hour of adjournment arrived; the Commission adjourned until ten o'clock A. M., to-morrow.

BALTIMORE, Oct. 4th, 1872.

The Commission met this morning, pursuant to adjournment, all the Commissioners being present. Mr. Jones proceeded, and concluded his statement on the part of Maryland, and submitted the following proposition of boundary between Virginia and Maryland, to wit: "Beginning at low water-mark at the divisional line between the two States of Virginia and West Virginia, upon the southwest coast or shore of the Potomac River; thence following the said river at said low water-mark, to all wharves and other improvements, now extending, or which may hereafter be extended, by authority of Virginia, from the Virginia shore into the said river beyond low water-mark; and following the said river around said wharves and other improvements to low water-mark on the southwestern side thereof, and following the said river in the same manner, down to the easternmost angle of Smith's Point, at the mouth of the said river Potomac, where it flows into the Chesapeake Bay; thence across the Chesapeake Bay, by a right line, to the centre of Cedar Straits, upon Tangier Sound, near the southern end of Watkins' Point; thence by a right line in a southeasterly direction, to the channel of Pocomoke Bay or River, nearest to Cedar Straits; thence up by and with the said channel of said

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bay and river, to a point therein opposite to the place on the east shore of the said river, ascertained by Mr. De La Camp, in 1867, as the beginning on said shore of the divisional line, run and marked by Calvert and Scarborough, in 1668; and thence by and with said divisional line, as surveyed and laid down on the map made by said De La Camp for the Joint Commissioners of Maryland and Virginia, in 1868, to the Atlantic Ocean; the right of fishing and taking oysters in Pocomoke Bay and River and Potomac River, to be common to the citizens of both States." On the reading of which said proposition, the Commissioners on the part of Virginia took time to consider the same apart. And thereupon, the Commission adjourned till to-morrow, at ten o'clock A. M.

BALTIMORE, Oct. 5, 1872.

The Commission met this morning pursuant to adjournment. All present.

Mr. Wise, on behalf of the Commissioners of Virginia, submitted the following propositions, to wit: "The Commissioners of Virginia having met separately and considered the proposition submitted to them by the Commissioners on the part of Maryland, most respectfully decline to accept the same, and in turn submit the following, to wit: "The northern boundary line of Virginia shall henceforth be fixed and established at low water-mark, on the left or northern shore or strand of the Potomac River, for the whole extent of that shore of said river where it is co-terminus between the two States of Maryland and Virginia to the extreme end of Point Lookout, the northern headland of said river where it disembogues into the Chesapeake Bay. Thence by a right line across said bay and Smith's Island therein, to the westernmost angle of Watkins' Point, being the northern headland of Little Annamessex River; and thence by and with the line run by Philip Calvert and Edmund Scarborough in the year 1668, over the Pocomoke River and Swansecute River or Creek, to the shore of the Atlantic Ocean on Assateuque Island."

The Commissioners, on the part of Maryland, having con-

sidered these propositions submitted by the Commissioners on the part of Virginia, most respectfully declined the same.

At this point the Commissioners took a recess until seven o'clock P. M.

The Commission reassembled at seven o'clock P. M., when Mr. Jones, on the part of the Maryland Commissioners, submitten a second offer of compromise as follows, to wit:

"The Maryland Commissioners propose another and a second compromise of the boundary controversy between the two States, viz: Beginning at the point on the Potomac River described in their first offered compromise line, and thence to Smith's Point, as stated in their said first offer, and thence by a line across Smith's Island to the place on Jean's Island Bar where the light-house stands; thence by a right line to the centre of Cedar Straits, and thence to the channel of Pocomoke Bay, and thence up, by and with said channel of said bay and river, and by and with the Scarborough and Calvert line to the ocean, as described in their first offered compromise line."

The Commissioners of Virginia, informed the Commissioners upon the part of Maryland, that they most respectfully declined their second proposition, and there upon the Virginia Commissioners made their second proposition, to wit:

"Proposition of boundary offered by the Commissioners on the part of Virginia for and as a compromise line of boundary between the States of Maryland and Virginia."

The line run by Philip Calvert and Edmund Scarborough, in the year 1668, from the right bank of the Pocomoke River over the same, and over Swanseacute Creek or River, and over the bays and sounds and islands on the sea-side of the peninsula, formed by the Chesapeake Bay and the Atlantic Ocean, to the shores of said ocean on Assateaque Island, straightened and corrected so as to make it a right line, shall be on that part of the boundary between the States of Maryland and Virginia, the divisional line between the said two States; and the same shall be fixed by permanent monuments, to be as early as possible, erected by the said two States. Then begin-

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ning at the terminus of said line on the right bank of the Pocomoke River, shall follow the said banks of that river down the same, to the eastern headland of East Creek, at or near the head of Pocomoke Sound, on the north side thereof, where a permanent monument shall be erected as aforesaid. Thence by a right line, over the water to the middle of the channel of Cedar Straits; thence through said straits northwestwardly to a point due south from the western headland of said straits; thence to low water-mark of the shore of said headland, where a permanent monument shall be erected thereon; thence north to low water-mark on the shore of the north headland of Little Annemessex River where a permanent monument shall be erected thereon; thence to the point where the 38th degree of north latitude cuts across the Tangier Sound and Smith's Island, at or near Barne Point thereon, and there a permanent monument shall be erected; thence along the shores of the north end of Smith's Island at low water-mark, on Kedge's Straits, until it reaches the shores of that island on the Chesapeake Bay; thence following said shore, at low water-mark, until it reaches the said parallel of 38° north latitude, at or near the great thoroughfare of Smith's Island, where a permanent monument shall be erected; and thence to run on said parallel to the point where the said parallel is cut by a meridian line drawn through the extreme southern angle of Point Lookout, at the mouth of the Potomac River, and thence up that river, on the main channel thereof, to the point in that river at or opposite to where the divisional line between Virginia and West Virginia touches the said river Potomac."

The Maryland Commissioners considered, and most respectfully declined this proposition, and thereupon the Commissioners, on the part of Virginia, by way of compromise, proposed to the Commissioners, on the part of Maryland, the following, to wit;

"The Commissioners, on the part of Virginia, by way of compromise, propose to the Commissioners, on the part of Maryland: That the line between the two States shall run

by and with the main channel of the Potomac River, until it descends to the point where the meridianal line drawn through the extreme northeastern angle of Point Lookout, the north headland of the mouth of said river, cuts the parallel of the 38th degree of north latitude; thence by a right line to the westernmost angle of Watkins' Point, it being the northern headland of the mouth of Little Annamessex River, thence by a right line to the southwestern angle of the land and marsh at Cedar Straits, north of these straits; thence to the main channel of those straits, north of the most northern of the Fox Islands; thence due east to the channel of the Pocomoke Sound or River; thence up the main channel of said sound and river, to the place where the Calvert and Scarborough line was run over that river in the year 1668; and thence by the marks and monuments on that line, to the shore of the Atlantic Ocean, on the Assateague Island.

The Commissioners on the part of Maryland, considered and informed the Commissioners on the part of Virginia, that this, their third proposition, was most respectfully declined.

The Commissioners on the part of Maryland, then offered the following, to wit:

"The Maryland Commissioners, in a further effort to settle and adjust the boundary line between Virginia and Maryland, by compromise, respectfully submit for the acceptance of the Virginia Commissioners, the following line, to wit:

"Beginning at the point on the Potomac River described in their first offer; thence running down the said river to Smith's Point, in the the manner set forth in their first offer; thence running by a right line to the centre of the great thoroughfare of Smith's Island, called Mister's Thoroughfare; thence by and with the middle of the said thoroughfare, to the mouth thereof, at a place called Big Island; thence by a right line through the centre of Cedar Straits, to the channel of the Pocomoke Sound or Bay; and thence up, by and with the channel of said sound and Pocomoke River, to the point opposite to the Calvert-Scarborough line, as described in

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their first offer; and thence by and with the Calvert-Scarborough line to the Atlantic Ocean.

And the Maryland Commissioners respectfully submit the foregoing as their last offer of compromise, and if accepted, it must be with the understanding that all existing titles, rights and liens upon the land south of said thoroughfare granted by Lord Baltimore, shall continue in full force, and be considered and treated as valid in law, as if granted by the State of Virginia, or as any grant of confirmation by said State can render them or any of them.

This proposition was most respectfully declined by the Virginia Commissioners, and they announced on their part, that they had no other proposition of compromise to submit. Thereupon the Commission after further conference adjourned, to meet at Richmond, Va., on Thursday, the 7th day of November next.

RICHMOND, VA., Nov. 7th, 1872.

Pursuant to adjournment, the Joint Commission assembled here to-day.

Present—Messrs. Jones, Aydelott and Waters on the part of Maryland, and De Jarnette on the part of Virginia.

There being no quorum present, the Commission adjourned until to-morrow morning, 11 o'clock.

RICHMOND, Nov. 8th, 1872.

The Joint Commission met this morning, pursuant to adjournment.

Present—the same as yesterday.

The Commission was this morning informed that Governor Wise, one of the Commissioners on the part of Virginia, was unavoidably detained in the trial of a cause in Prince William county, Va., and would not be present to-day.

Col. Watts not having been heard from, and there being no quorum present, the Commission, after spending the day in the examination of maps, and documents in the archives of the State of Virginia, adjourned until to-morrow morning, at 10 o'clock.

RICHMOND, Nov. 9th, 1872.

The Commission met again to-day, pursuant to adjournment.

Present—the same as yesterday.

Col. De Jarnette stated, that the statement of the claim of Virginia was ready, but not having been copied, he was not prepared to furnish the Maryland Commissioners with the same.

Colonel Watts and Governor Wise being both absent again to-day, no regular meeting was held.

The Commissioners, who were present, again spent the day in examining documents in the Virginia State Library, and adjourned to such time as may hereafter be agreed upon.

BALTIMORE, November 18th, 1873.

The Joint Commission assembled here to-day, pursuant to agreement by correspondence.

Present—Messrs. Jones, Aydelott and Waters, on the part of Maryland, and Wise, on the part of Virginia. Absent—Messrs. De Jarnette and Watts.

No quorum being present, a regular meeting of the Commission was not held to-day. Adjourned until to-morrow morning, at ten o'clock, to await the arrival of other Commissioners.

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BALTIMORE, November 19th, 1873.

The Commission met this morning, pursuant to adjournment yesterday.

Present—Messrs. Wise and Watts, on the part of Virginia, and Jones, Aydelott and Waters, on the part of Maryland.

The day was passed in examining and discussing maps and documents in the rooms of the Maryland Historical Society, relating to the questions at issue before the Commission.

At half-past four P. M., the Commission adjourned till to-morrow morning, ten o'clock.

BALTIMORE, November 20th, 1873.

The Commission met this morning pursuant to adjournment yesterday.

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Present—the same as yesterday.

Mr. Wise, on the part of the Commissioners of Virginia, submitted to the Commissioners of Maryland, the following proposition of boundary, by way of compromise:

"To commence at the point in the channel of the river Potomac, opposite the point where the States of Virginia and West Virginia are co-terminus on the right bank of said river; and to follow the main channel of said river to the mouth thereof, at the point where the meridian of Point Lookout, the north headland of said river, cuts the 38th degree of north latitude; and this line shall be henceforth held, and deemed the divisional line of the States of Maryland and Virginia, west of the Chesapeake Bay."

The Commissioners on the part of Maryland, upon hearing said proposition, announced that they preferred to leave the boundary of the two States on the Potomac, as it was left by the Constitution of Virginia of 1776, and the compact between the two States in the year 1785; and they proposed to consider the adjustment of the boundary from Smith's Point at the mouth of the Potomac River, across the Chesapeake Bay, and Eastern Shore to the ocean. The Commissioners upon the part of Virginia acquiesced in this suggestion, and called for any propositions of compromise of the line over the Chesapeake Bay and across the Eastern Shore peninsula, which the Commissioners of Maryland had to submit. Whereupon, Mr. Jones, on the part of the Maryland Commissioners, submitted the following proposition:

"The boundary line from Smith's Point to be a right line across the Chesapeake Bay, to the centre of Cedar Straits upon the Tangier Sound, near the south end of Watkins' Point; thence by a right line in a southeasterly direction to the channel of Pocomoke Bay or River nearest to Cedar Straits; thence up, by and with the channel of said Pocomoke Bay and River, to a point therein opposite to the place on the east shore of said river, ascertained by D. La Camp in 1867, to be the beginning on said shore, of the divisional line said to have been run and marked by Calvert and Scar-

borough in 1668; and thence by and with said divisional line as surveyed and laid down on the map made by said De La Camp for the Joint Commission of Virginia and Maryland in 1668, to the Atlantic Ocean. The right of fishing and taking oysters in Pocomoke Sound, or Bay and River; and in Tangier Sound, from the south end of Tangier and Watts' Islands to the north end of Deal's Island; and thence west to the Chesapeake Bay to be common to the citizens of both States, and subject to concurrent regulations by the two States," which proposition the Commissioners on the part of Virginia respectfully declined to accept.

Thereupon, the Commissioners of Maryland stated that they had no other proposition of compromise to submit.

The Commissioners on the part of Virginia, by way of compromise, then offered the following proposition:

"To commence at the point in the mouth of Potomac River, where the meridian of Point Lookout, the northern headland of said mouth of said river, cuts the 38th parallel of north latitude, and to run a right line across Smith's Island, to the low water-mark of the north headland of Little Annamessex River; thence a right line to low water-mark at the end of Watkins' Point at Cedar Straits; thence to the channel of said straits; thence a right line to the mouth of East Creek, at the head of Pocomoke Sound; and thence on and by the right bank of Pocomoke River, to the point where the line run by Philip Calvert, on the part of Maryland, and Edmund Scarborough, on the part of Virginia, in the year 1668, crosses said river of Pocomoke; and thence by said Calvert and Scarborough line to the ocean."

This proposition was respectfully declined by the Maryland Commissioners. Whereupon, Mr. Wise, on the part of the Commissioners of Virginia, offered the following proposition:

"To commence as described in the last proposition, and to run on the 38th parallel of north latitude until said parallel reaches low water-mark on the eastern coast of Smith's Island; and thence to run a right line to the former location of a light-boat, as described in the maps reported by Michler

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and De La Camp, in the year 1858–9, near the north headland of Little Annamessex River, on Jean's Island; and thence a right line to the channel of Cedar Straits; and thence a right line to the head of Pocomoke Sound, and up the Pocomoke River and across the same; and thence by the Scarborough and Calvert line of 1668, to the ocean."

This proposition the Commissioners on the part of Maryland, respectfully declined to accept. And thereupon, the Commissioners on the part of Virginia, announced that they had no other proposition of compromise to submit.

Thereupon, there being no other business to be considered or transacted by the Commissioners, they agreed to adjourn *sine die*, and to make final report of their proceedings to the Governors and Legislatures of their respective States.

LEVIN L. WATERS, *Secretary*.

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STATEMENT OF THE MARYLAND CASE.

The Boundary Line between Virginia and Maryland.

Some question has been made as to the accuracy of the commonly received charter of Maryland and its English version as contained in Bacon's Laws, published in 1765. But a careful examination and comparison of the translation of the charter, as printed in London in 1636, in the "Relation of Maryland," and as printed in Bacon's Laws, in 1765; and as contained in the "transcript of the original instrument in Latin, with the abbreviations extended, copied from the Patent Roll, 8 Charles, 1, and translated by Thos. Edlyne Tomlins, Esqr., Attorney-at-Law and Record Solicitor, at London, in 1871," for the Virginia Commissioners, show, that there is no substantial difference among them in the description of the territory granted to Lord Baltimore by the charter of the 20th day of June, 1632, or in any other particular. In Mr. Tomlins' translation the bounds of the territory are described thus: "Of a grant to him and his heirs, To Cecil, Baron of Baltimore, The King, &c., To all whom, &c., Greeting:

"Know ye therefore, that we, regarding with Royal favor the pious and noble purpose and intention of the aforesaid Baron of Baltimore, of our special grace, certain knowledge and mere motion, have given, granted and confirmed, and by this, our present charter, for us, our heirs and successors, do give, grant and confirm to the aforesaid Cecil, now Baron of Baltimore, and his heirs and assigns, All that part of the Peninsula or Chersonese lying in the parts of America between the ocean on the East, and the Bay of Chesapeake on the West, divided from the remnant of the same by a right line drawn from the promontory or headland called Watkins'

Point, beside the bay aforesaid, situate near the River of Wighco, on the West, as far as the great ocean on the Eastern coast, and between that Boundary on the South, as far as to that part of the Estuary of the Delaware on the North, which lieth under the fortieth degree of north latitude from the equator where New England is bounded; and all that tract of land within the boundaries under written, that is to say, going from the said Estuary, called Delaware Bay, in a right line in the degree aforesaid, to the true meridian of the first source of the river Potomack, then tending downwards towards the South, to the further bank of said river, and following it to where it faces the Western and Southern coast, as far as to a certain place called Cinquack, situate near the mouth of the same river where it discharges itself into the forenamed bay of Chesapeake, and from thence by the shortest line as far as to the aforesaid promontory or place called Watkins' Point. So as all the tract of land divided by the line aforesaid, between the great ocean and Watkins' Point, as far as to the promontory called Cape Charles, and singular, their appendages to us, our heirs and successors, are entirely remaining forever accepted. And also all islands and isles within the limits aforesaid. We do also grant and do confirm to the same Baron of Baltimore, his heirs and assigns, all and singular, islands and isles on the Eastern Shore of the aforesaid country towards the east, risen or to rise in the sea situate within ten sea leagues from the same shore, with all and singular ports, roads of shipping, estuaries, flowings of water and arms of the sea to the country or islands aforesaid belonging."

Where was Watkins' Point?

The first inquiry is, where *was* the point, called Watkins' Point, described as the beginning bounder, *from* which was to be drawn the right line across the *Peninsula*, to the ocean? It is scarcely necessary to remark, after the many proofs we have seen and heard of the great changes in the "Points," shores and islands of the Chesapeake Bay and its tributaries, which have taken place, especially in that vicinity, and with-

in the memory of living witnesses, and which are still going on; that the place called Watkins Point, in the charter to Lord Baltimore has long since been washed away, or does not exist as it there was. Let us examine then the description of it as contained in the charter. Mr. Tomlins translates it "Promontory," "Headland," or "place," the same words which are used in Bacon's translations, while in the "Relation of Maryland" it is called "Promontory" or "Cape of Land," and "place." Beside the Bay aforesaid, situate near the River of Wigheo," (Tomlins) "situate upon the Bay aforesaid, near the River Wigheo," (Bacon) situate in the aforesaid Bay, near the River Wigheo," (Relation of Maryland.) In Ogilby's America, published in 1671. "The Bounds" of his "New Description of Maryland," in words, nearly identical with those in the Relation of Maryland, are contained between quotation marks, ending with the last boundry line; thus, "unto the aforesaid Promontory or place called Watkins Point, which lies in thirty-seven degrees, fifty minutes, or thereabouts, of Northern Latitude." It is probable that the places mentioned in the charter and situated upon the Chesapeake Bay were known with reasonable certainty by intelligent Virginians residing in the Virginia Colony at that time. The Chesapeake Bay and many of its princial privers had been explored by Capt. John Smith, with fourteen others in a barge of two or three tons burthen, in June, July and August of 1608, the year after the first settlement at Jamestown. Smith had made a map of his explorations, and had written a general summary of the results of his two expeditions, and some of those who accompanied him had written a more detailed and particular account of his explorations of the bay, rivers and islands, all of which Smith published first in London in 1612, and afterwards in 1629. Lord Baltimore had passed the winter of 1628—9 in his pro-vince of Avalon, Newfoundland, and had become so dissatisfied with it as a residence, that he wrote to the king, August 19th, 1629, requesting a grant of land in Virginia, with a view to settle there. Without waiting for a

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reply he went to Virginia about the first of October, 1629, and visited Jamestown. Beverly in his History of Virginia, says, "the people there looked upon him with an evil eye, on account of his religion, for which alone he sought this retreat, and by their ill-treatment discouraged him from settling in that country." On that account, Beverly states, he made a journey Northward up the Chesapeake Bay, with a view of making a new plantation of his own. And finding that the settlements at that time reached no further than the South side of the Potomac River, "his lordship got a grant of the Propriety of Maryland." Beverly made a mistake in the date of this visit, in stating it to have been in 1628, and in stating the name of Lord Baltimore who made the visit and explorations, as Cecilius instead of George Calvert. But the fact of his personal exploration of the Chesapeake Bay in 1629 enabled him, with the aid of Smith's History and Map, more accurately to describe the bounds of the territory for which he afterwards obtained a grant. He had been one of the Virginia Company whose charter had been declared forfeited by the judgment of the Court of King's Bench in 1624, upon a writ of quo. warranto, and also a member of the Provisional Government formed by the King, after the province was thus restored to him, and doubtless was well informed about the affairs of the Colony. About 1622 the Virginia Colony numbered 1275 whites, 76 of whom lived on the Eastern Shore. The settlement on the Eastern Shore of Virginia was made in 1620, near Accomacke, an Indian town located on Smith's Map, near the the Cheriton—now Cherrystone River. One plantation was for the use and profit of the Company; another for the Governor, and one for the Secretary of the Province—"in lieu of salaries," and which plantations were to go to their successors in office.—Pory was Secretary of the Colony and made two excursions in 1620 to the Eastern Shore; an account of which was published in Purchas' Pilgrims in 1625, and is mentioned in Smith's Hist. of Va., vol. 2, p. 40. Pory mentions passing Russel's Isles and Onancock on his way from the Eastern

Shore to Pawtuxunt, which he visited on the invitation of, and in company with, the king of a large tribe on that river. Bozman, vol. 1, p. 149—(note) says, "the original account of Pory's Travels probably contained a description of Rusel's Isles and Onancock and Pawtuxunt, which Smith thought "needless to be writ againe," in this part of his work; but it does not appear that Onancock was ever before mentioned by him therein." But it is mentioned as well known to the Virginians at that time. It appears that during the years of 1627, 1628 and 1629 the Governor of Virginia gave authority to William Clayborne, the Secretary of State, to explore the Chesapeake Bay; and this, says Chalmers Annals, (ch. 9, note 12,) was in pursuance of special instructions from Charles the first to the Governor of Virginia to procure exact information of the rivers of the country.—Clayborne and his associates were extensively engaged in trading with the Indians of the Chesapeake and its tributaries, and in May 1631 obtained a license of King Charles 1st, authorizing him, his associates and company, from time to time, to trade for corn, furs, &c. with ships, boats, men and merchandise, in all seas, coasts, harbors, lands, or territories in or near about those parts of America, for which there is not already a patent granted to others for sole trade, with command to Gov. Harvey of Virginia to permit such trade; giving to Clayborne full power to direct and govern, correct and punish such of our subjects as may be under his command in his voyages and discoveries." It was under this license of 1631 to trade, or the former license to explore the Chesapeake and trade, &c.; that Clayborne & Co. assumed to make the settlement upon Kent and Palmer's Islands in the Chesapeake Bay, which he afterwards made the basis of objections to Lord Baltimore's charter.

Lord Baltimore's religious faith precluded his taking the oath of supremacy, whereupon he was notified that he could not settle in that colony. After exploring the Chesapeake Bay with a view to obtain a grant of land North of the Virginia settlements for a plantation of his own; he left his

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lady in Virginia and hastened to England. On his arrival there he found a letter from the King, dated 22d Nov., 1629, advising him to desist from his designs to settle in America. Neill. 47. Gov. John Pott, Samuel Matthews, Roger Smyth and Wm. Clayborne in a letter to the Privy Council of Nov. 13, 1629, gave an account of Lord Baltimore's arrival in Virginia about the beginning of the preceding October and his refusal to take the oath of supremacy, and prayed that, "as they have been made happy in the freedom of their religion as heretofore, no Papist may be suffered to settle among them"—Neill. 47. Probably Lord Baltimore was not aware of this persistent opposition to his settling in Virginia, for in December 1629, he wrote a letter to King Charles, asking a letter from the Privy Council to the Gov. of Virginia in behalf of his lady—still there—to aid her in returning to England, and also prays for a grant of a portion of land in Virginia, the King having given him leave to choose a part. (Neill's—Terra.—Maria 4.)

Doubtless Lord Baltimore's purpose was well known in Virginia, for during the spring of 1630, "Francis West, who had been governor, William Clayborne, Secretary, and Wm. Tucker, one of the Council, were in London resisting the planting of a new colony within the limits of the settled parts of Virginia. (Neill 50.) Under these circumstances there is every reason to believe that the boundaries of the Province were well considered by the King, before the charter passed under the great seal. It had been prepared by Lord Baltimore during his leisure hours; had been submitted to and approved by the King, but before it had passed through all the formalities, George Calvert, the first Lord Baltimore, died on the 13th April, 1632. Three months after his death, the Patent was regularly issued to Cecil, the 2d Lord Baltimore. Those who had resisted the granting of the Patent made immediate efforts to obstruct Lord Baltimore in his preparations to occupy his Province. A remonstrance was presented to the King in May, 1633, "that some grants have been lately obtained of a great portion of

lands and territories of the Colony there, being the places of their traffic and so near to the habitations, as will give a general disheartening to the planters, &c. The King on the 12th May, 1633, referred the petition to the Privy Council. On the 4th June, 1633, the Council appointed the 28th of that month for the hearing, giving notice to all the parties interested to attend. The hearing was had accordingly, and an order was passed that Lord Baltimore and the planters of Virginia (meaning, of course, their agents and attorneys in England) should meet together between then and the 3d of July, 1633, and endeavor to accommodate their controversy in a friendly manner. Also that the propositions made by either party should be set down in writing, with their several answers and reasons to be presented to the board on that day. This was likewise accordingly done. And at a meeting of the Council on 3d July, 1633, they decided "to leave Lord Baltimore to his patent, and the other parties to the course of law, according to their desire."—Chalmers' Annals, ch. 9, note 18. Lord Baltimore then proceeded to occupy his Province, and the settlement was made at St. Mary's on the 27th March, 1634. Clayborne continued his opposition to Lord Baltimore's authority over Kent Island, and fitted out an armed expedition in 1635, under command of Lieut. Warren, to seize and capture any of the pinnaces or other vessels belonging to the government of St. Mary's. The government of St. Mary's also armed two pinnaces under the command of an officer, and the hostile forces met, says Bozman in April or May 1635, in either the Pocomoke or Wighcomoco Rivers on the Eastern Shore of the Province where a battle commenced, "which resulted in the death of Lieut. Warren and two of his men, and of one of the Maryland men."—Bozman's History of Maryland 1, vol. 35.—Clayborne had before this fled to Virginia, and Gov. Harvey declined to surrender him to the demand of the Governor of the Maryland Province, but sent him and the witnesses to England. Here Clayborne and his partners in trade, (two merchants in London,) presented a petition to the King

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about 26th Feb., 1637, setting forth that by "virtue of a commission under his majesty's hand, divers years past, they discovered and planted the Isle of Kent in the Bay of Chesapeake, which Island they had bought of the kings of that country; that great hopes for trade of beavers and other commodities were like to ensue by the discoveries, and that Lord Baltimore observing this had obtained a patent, &c." They then gave their version of the "battle," and of Lord Baltimore's seizure of the Isle of Kent and another Island at the head of the Bay, which they purchased from the Indians, and upon which they had settled a plantation and factory, &c. They prayed for a grant of confirmation "for the quiet enjoyment of their said plantations," and "to refer their wrongs and injuries to such persons as his majesty should think fit." The petition was refered to the Lords Commissioners of Plantations, who after "a tedious controversy," and after hearing all parties "made their adjucation on the 4th April, 1638." A copy of their report is recorded in the Maryland records of Council Proceedings from 1636 to 1657, p. 8. A copy is also published in Hazard's collections, vol. 1, p. 130, purporting to be from "Votes of the Assembly of Pennsylvania," and in Chalmer's Annals, ch. 9, note 25, taken, as he states, from "Maryland Papers, vol. 1, bundle C" in the plantation office, England. A copy is also published in Bozman's Maryland, vol. 2, p. 584, note 11. The substance of their adjudication was "That the lands in question absolutely belonged to Lord Baltimore, and that no plantation or trade with the Indians ought to be allowed within the limits of his patent without his permission; that with regard to the violences complained of, no cause for any relief appeared, but that both parties should be left to the ordinary course of justice." Clayborne assisted by Sir Wm. Alexander, the Kings Secretary for Scotland, and Clayborne's patron in the business, "partly by misrepresentation," as Chalmers observes, procured a letter from the King, dated 14th July, 1638, to Lord Baltimore, commanding him to permit Clayborne and his partners to be safe in their per-

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sons and goods there till that course be decided. Lord Baltimore on receiving the order, as Chalmers proceeds to state, said: that he would "wait on the King and give him perfect satisfaction." Subsequent events justify us in supposing, that when the King came to be fully informed of all the circumstances relative to Clayborne's claims and Lord Baltimore's rights, the adjudication of the Lords Commissioners was finally ratified by his majesty—Bozman vol. 2, p. 72. "In virtue of this decision of the Lords Commissioners, and most propably, in pursuance of some special order from his majesty to that purpose, the Gov. of Virginia, Sir John Harvey, issued his proclamation bearing date "the 4th of October, 1638."—2 vol. Bozman Md., p. 72. "This proclamation (copied from the said "Council Proceedings from 1636 to 1657, p. 319," and published in Bozman's History of Maryland. vol. 2–586) is in the following words, to wit: "By the Governor and Captain General of Virginia, with the advice and consent of the Council of State."

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A PROCLAMATION.

"Whereas the King's most excellent majesty was pleased by his letters-patent to grant unto the right honorable, the Lord Baltimore, a territory or tract of land therein nominated and now known by the name of the province of Maryland, with divers franchises and immunities thereunto belonging, as in and by the said letters-patent more at large appeareth; notwithstanding which said royal grant and publication thereof in this colony, divers persons ill-affected to the government established by his majesty, both here and in the said province, have by pretence of a former commission, factiously combined to disturb the said Lord Baltimore in the possession of part of his said territory, as also to infringe the privilege of trade, in express terms solely granted to the said Lord Baltimore within the said province, and after many violent and disorderly courses the said pretenders have so far proceeded as to petition his majesty, that part of the said province, now known by the name of the Island

of Kent and Palmers Island, with the trades thereof, might be confirmed to them, the consideration of which, their said petition his majesty was pleased to refer to the most reverend and right honorable, the Archbishop of Canterbury, the lord keeper, the lord privy seal, and any others, the commissioners of plantations, who should be near at hand, and who their lordships were pleased to call. Whereupon, their lordships meeting, after a full hearing of both sides, the said pretenders commissions being likewise read, their lorships did declare the right and title to the Isle of Kent and other places in question to be absolutely belonging to the Lord Baltimore, and that no plantations or trade with the Indians ought to be within the precincts of his patent without license from him, as in and by the order of their lordships more at large appeareth. These are, therefore, for the future preventing of further mischiefs and injuries, which may arise from ignorant mistakes or presumptions and pretences as formerly, in his majesty's name to prohibit all persons being or inhabiting, or which shall hereafter be and inhabit within the government of this colony by themselves or others, either directly or indirectly, from the date of these presents to use, exercise, or entertain any trade or commerce for any kind of commodity whatsoever, with the Indians or savages inhabiting within the said province of Maryland, viz: Northward from the River Wiconowe, commonly called by the name of Onancock, on the Eastern side of the grand Bay of Chesapeake, and Northward from the River Chinquack, called great Wicomico, on the Western side of the said bay. And for the better regulating of all trades within the said colony; it is further hereby commanded that no persons shall resort unto the habitations of the aforesaid Indians, without license first obtained for their so doing from the Lord Baltimore or his substitute, upon forfeiture of the goods and vessels or the full value of them, which shall be lawfully evicted to be traded or employed contrary to the premises, with such further punishment by imprisonment of the parties or party offending against the true intent and

meaning of the said proclamation, as shall be thought fit by the government and council.

Given at James City, the 4th of October, Anno Regni Regis Caroli dicimo quarto, Anno. Domi. 1638.

God save the King.

Vera Copia,

RICHARD KEMP,
Secretary."

The above proclamation was doubtless well known to every intelligent inhabitant of the Virginia Colony at that day.—The outlines of the Chesapeake Bay and the rivers and islands, as laid down on Smith's map, must have been traced during his exploring expeditions in 1608, or from minutes and memoranda then made. His history and map were published in 1612 and in 1629; and being the only map then extant containing the names of places mentioned in Lord Baltimore's charter, was doubtless the guide of the King and Lord Baltimore in describing the boundaries of the Province granted by the charter. Smith's Map was made under such circumstances and on so small a scale, that nothing more than a general idea of the places described could be reasonably expected.

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Bozman, (whose History of Maryland was written about 1811,) says it is wonderfully correct, considering the time and circumstances under which it was made, yet it is certain that by comparing it with the latest and best Maps of the Chesapeake, particularly Griffith's Map of Maryland, we may perceive material errors, especially in those parts of it contiguous and adjacent to Watkins Point.

A pamphlet had been published in London by Lord Baltimore in 1635, entitled, "A Relation of Maryland, together with a Map of the Country; the condition of Plantations, and his majesty's charter to Lord Baltimore trans'ated into English." This pamphlet was evidently published to show the boundaries and location of the Maryland Province, and

tion was deemed to be of such importance that it was recorded among the proceedings of the Governor and Council of Maryland, as was also the adjudication of the Privy Council aforesaid, dated April 4th, 1638. After the death of Charles the first, Clayborne again threatend to attempt to take possession of Kent Island by force, and an Act of the Maryland Assembly was passed in 1650 in reference to said threat, in the preamble to which the order of the Privy Council of the 4th of April, 1638 and the "Proclamption made and published in Virginia the 4th of October, 1638, by the authority of the then Governor there, with the advice and consent of the Council of State," are specially recited.

The next reference to the bounds of Maryland is found in a letter of instructions, dated 26th of August, 1651, from Lord Baltimore to his Governor, Wm. Stone. In this letter Lord Baltimore refers to certain false rumors he had understood to be rife in the province, "of a dissolution or resignation here of our patent and right to that province," and that he had understood "that Sir. Wm. Berkeley had lately taken upon him to grant a Commission to one Edm'd Scarborough of Accomac, in Virginia, to sett Palmer's Island within our said province, and to trade with the Indians, &c.," which was so strange a usurpation that he could not easily believe it to be true; but in case the said Scarborough, or any other should presume to seat, or trade in, or through, any part of his province, without his authority, he required the Governor to prevent him or them from so doing, and to seize upon his or their person, boats and goods, &c. And after numerous other instructions upon a variety of subjects, he adds; "And for the better publication and remembrance of the bounds between Virginia and Maryland, and prevention of any controversies which may otherwise hereafter happen between the inhabitants of Virginia and those of our said province, about the same, we require you, our said Lieutenant, to encourage some English as soon as you can, to take up such land as shall be due unto them in our said province, near to the bounds of our said province, according to the maps

thereof, which we sent thither about two years since, and to pass grants in our name, under our great seal, to such as shall desire the same, of as much land in those parts of our said province as shall be due unto them as aforesaid, especially on or near the bounds of our said province, on that tract of land which is commonly called the Eastern Shore, lying between the Bay of Chesapeake and the Sea." Unfortunately those maps cannot be found. They were sent over (and probably made) some 16 years after that of 1635, before mentioned. In another letter of instructions from Lord Baltimore to his Governor and Council, dated 23d October, 1656, among other items is the following, to wit: "That they do take special care that no encroachments be made by any upon any part of his lordship's said province; for the better prevention whereof, his lordship requires his said Lieutenant and Council *to cause the bounds thereof to be kept in memory, and notoriously known, especially the bounds between Maryland and Virginia, on that part of the country known there by the name of the Eastern Shore, to which* his lordship would have them peruse one of the maps of Maryland, which his lordship formerly sent thither; whereby the said bounds are described, and his lordship hath also for their direction therein, sent herewith, a copy of a proclamation published heretofore by the then Governor and Council of Virginia, for prohibiting any of Virginia, to trade with the Indians in Maryland without his lordship's lycense, which proclamation bore date 4th October, 1638, and therein are described the bounds between Maryland and Virginia; the said copy having been transcribed out of another copy thereof, which his lordship hath, attested by Mr. Richard Kemp, deceased, who was Secretary of Virginia when the said proclamation was made. Given under his lordship's seal at arms, 23d October, 1656—C. Baltimore." Maryland Council Book, H. H., 1656 to 1668, p. 4.

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It is thus shown with certainty, that as late as 1656 Lord Baltimore, in an official paper addressed to his Governor

and Council in Maryland, charges them to guard with special care against encroachments upon any part of his province, and directs them to the proclamation of the 4th of October, 1638, as a public document, published by the government of Virginia, wherein are described the bounds between the two provinces.

Charles the first had described, in the charter, the line of division of the Eastern Shore peninsula, specially reserving all that part of it, South of the divisional line for himself, his heirs and successors. The Governor and Council who issued the proclamation were appointed by him, and were not likely to do any act to the prejudice of his rights. The Council were especially known to be hostile to Lord Baltimore. For eleven years, during the King's life, and in the fullness of his power, the proclamation remained unquestioned.

After his death, and after the Parliament took in hand the government of England, Clayborne and Bennett; influential Virginians, the special enemies of Lord Baltimore, together with Capt. Curtis, claiming to act under a Commission from the Council of State for the Commonwealth of England, took possession of the Governments both of Virginia and of Maryland, and had control over the latter, from 29th March, 1652, for several succeeding years. If there had been error in describing the limits of Lord Baltimore's charter, in the proclamation of 1638, these intelligent Virginians must have been aware of it; and especially Clayborne, who was not only a "person of quality and trust," as described by King Chas. the First, in the Commission to him as Secretary of Virginia, dated 4th March, 1625; but was unquestionably, a man of intellectual ability; and residing in the Colony, with fullest opportunities of perfect knowledge of all the affairs of the Colony.

It is not likely with the power in his hands, with his known hostility to Lord Baltimore, and his Charter, that he would let slip an opportunity to correct an error, if such

was known or supposed to exist in the proclamation, as to the bounds of the Maryland province, whilst his authority over Maryland existed. Special care was taken to have Clayborne's own claim to Kent and Palmer's Islands revived and recognised. His friend and colleague in governing Maryland, Richard Bennet, was one of the negotiators of a treaty with the Susquehannah Indians, on 5th July, 1652. The treaty recognized the right of the English nation "to all the land North of the Patuxent and Choptank rivers, excepting the Isle of Kent and Palmer's Island, which belongs to Captain Clayborne." Again in November, 1652, when the government of Maryland, then acting under the authority of Clayborne and Bennet, directed an armed expedition to be fitted out against the Eastern Shore Indians, the Southern bounds of Maryland are especially referred to in the order, appointing Capt. Fuller to the command of the expedition. His Commission was "to march against all or any Indians inhabiting upon the Eastern Shore of the Bay of Chesapeake, *to the Northward of the Southerly bound of this province on that side of the Bay; being over against Wicokomico Point;* and from thence in a direct line eastward to the main Ocean. Wicokomico Point, here mentioned, was doubtless the point projecting into the Bay, from the North Shore, of the Great Wicokomico River on the Western Shore, near "the place called Cinquack;" the words "over against" meaning "opposite to." This point, although not named, is distinctly laid down on the map in the "Relation of Maryland," and the line dotted thence to Watkin's Point and thence to the Ocean, is nearly an east line. We think there can be no doubt that the Pocomoke river was originally called by the Indians Wighcocomoco. Smith and his associates explored the river, and had intercourse with the natives residing upon it. Smith's general summary of his voyages up the Bay was evidently written some time after they had been completed. Whereas the two accounts written by his associates, are more in the form of a diary, at least, following a consecutive form—giving the events in the

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order of their occurrence, as if written during the voyage. Doctor Russel, Todkill, and Mumford, call the river Wighcomoco in three places, on one page, (Smith's History, vol. I, page 175.) After two days more spent among uninhabited Isles, after leaving the Wighcocomico, going North, "they came to the river Cuskarawaok," admitted to be the Nanticoke. Smith, (reversing the actual order of his expedition, as if he had gone up the Western Shore and returned by the Eastern Shore,) after describing the Bay describes the rivers of the Western Shore, as far as he explored them, to the head of the Bay. He then mentions on the East side of the Bay, the river Tockwough, (the present Sassafras,) the Rappahanock, (probably now Fishing Bay, in Dorchester County,) "near to which, is the river Kuscarawaock." "After that is the river Wighcocomico." "The people of those rivers are of little stature, and of another language from the rest, and very rude. But they on the river Acoahanock and they of Acomack, doth equal any of the territories of Powhattan, and speak his language, who over all those doth rule as king." 1 Smith's History, 176. Dr. Russel and others state that "This river (the Cuscarawaok) but only at the entrance, is very narrow, and the people of small stature, as those of Wighcocomoco;" evidently meaning the Wighcocomoco, now Pocomoke, which they had explored as high as the cross on the map, and of which they had given a particular account.

There is not the slightest intimation in Smith's History or map, that he ever saw or heard of any other Wighcocomoco on the Eastern Shore of the Bay. Smith, in describing the rivers of the Western Shore, begins with the Powhatan, (the James River,) then describes the Pamunkee and Tappahannock and says, "The fourth river is called the Potowomake, 6 or 7 miles in breadth."

"First on the South side at the very entrance is Wighcocomoco," now little Wicomoco. (Smith's History, Vol. I, p. 118.)

Afterwards, on the 120th page, describing the rivers on the East side of the Bay, coming South, he says, "After that (the Kuscarawaock) is the river Tants Wighcocomoco;" evidently meaning the Wighcocomoco described by Dr. Russel and Co. and called by Smith Tants Wighcocomoco, to distinguish it from the other Wighcocomoco on the Western Shore "at the very entrance of the Patowmaock" which latter Wighcocomoco is not mentioned at all in the account written by Dr. Russel and Co. We cannot therefore see, if Smith's History had been carefully examined, how any question could have arisen about the identity of the river Wighco, mentioned in the Lord Baltimore's Charter, with the river since known as the Pocomoke. Some question however in relation to the bounds between Maryland and Virginia (but what it was does not appear) seems to have assumed importance, during the time Bennett and Clayborne ruled over Maryland. Cromwell was said to have written some letters to Bennett and Clayborne, in January, 1655, upon this subject. But all we know of their contents is the explanation of their purport given by Cromwell in a letter to the same persons as Commissioners of Maryland, dated 26th Sept., 1655. In this letter he says; "our intention was only to prevent or forbid any force or violence to be offered by either of the plantations of Virginia or Maryland from one to the other upon the differences concerning their bounds; the said differences being then under the consideration of ourself and our Council here." The "differences," whatever they were, remained undetermined by Cromwell and his Council at the time of his death. The persistent efforts of Clayborne and Bennett, during their reign over Maryland, having failed to induce Parliament or Cromwell to interfere with Lord Baltimore's proprietary rights, the government of his province was finally restored to him in March, 1657-8. Up to this time no settlements upon the Eastern Shore, within the limits of Maryland, below Choptank river, had been made under grants of land by Lord Baltimore, so far as we have been able to ascertain. The

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settlements on the Eastern Shore of Virginia had extended northward. A letter from Col. Edmund Scarborough to the Governor and Secretary of Maryland, in relation to a war he was about to prosecute against the Assateague Indians, bears date "From Onancock, 28th August, 1659." Early in the session of the Virginia Assembly of 1660 they passed a stern law against the Quakers, forbidding their being brought into the colony, requiring all Quakers, on detection, to be imprisoned, without bail, until they took an oath to leave the country and gave security that they would never return, with other most stringent provisions. I, Howison's History of Virginia, 319. This act doubtless enabled the Governor of the Maryland province to comply with Lord Baltimore's orders of 1651 and 1656, to people that part of his territory on the Eastern Shore next adjoining to Virginia. A commission, issued by Gov. Philip Calvert, dated on the 6th of Nov., 1661, to Col. Edmund Scarborough, Randal Revell and John Elsey, authorizing them or any two of them, for the term of six months, to grant warrants for land upon the Eastern Shore of this province, in any part below Choptank river, upon the conditions therein described, recites that it was issued upon "the petitions of divers persons" well affected to this province now, or late inhabitants of North'pton County, otherwise called Accomack, in Virginia, who are desirous to transplant themselves and families into this province." Scarborough, Elzey and Revell were residents of the Eastern Shore of Virginia, and were empowered to grant warrants for 50 acres of land for every person transplanted, on condition that before warrant was granted, each person should take the oath of fidelity to Lord Baltimore before two of the Commissioners, being in Maryland. Randall Revell and John Elzey themselves settled at Manokin; and on 2d May, 1662, Randall Revell reported to the Governor that there were then "seated 50 tithable persons at Manokin and Annamessick," and desired that "course might be taken for the supply of the plantation, or continuance of the Commission to himself

and the others." On the same day it was ordered, "that the Commission for granting warrants for land dated 6th November last, be renewed to Col. Edmund Scarborough, Randall Revell and John Elsey, to continue until recalled." This Commission seems to have been continued until 4th February, 1663, on which day a Commission, in similar terms, was issued by Gov. Charles Calvert, to John Elsey, Randall Revell and Stephen Horsey. Scarborough was thus left out of the Commission, but that he had accepted the trust and acted under it, appears from a reference to him in a document dated 3d June, 1664, issued by Gov. Charles Calvert, appointing Philip Calvert to deliver a copy of it to Gov. Berkley, of Virginia, &c. This document had special reference to the claim then recently set up by Virginia to the territory settled at Manokin and Annamessec; and to Col. Scarborough's armed invasion of that part of Maryland in October, 1663. This document states that Col. Scarborough "did, about the tenth day of October last, in a hostile manner, enter many miles into this province, to the terror of the people at Manokin and Annamessex, beating, abusing and imprisoning *the people there by him long before seated, by virtue of a Commission from this Government directed, and contrary to his certain knowledge of the bounds of the said province.*" That most extraordinary claim seems to have originated with Col. Scarborough. The first notice of it to the Maryland authorities appears in a letter from Mr. John Elsey, dated "Manokin, this —th March, 1662," (but actually 1663 N. S.) to Mr. Sewell, Secretary of Maryland. As this document shows the origin of the controversy as to the true location of Watkins' Point and the action of the Maryland authorities upon the first notice of it, we copy the proceedings, as they appear in the Maryland records, Liber H. H., folio 170:

"At a Council held at St. John's 8th April, 1663, was read a letter from Mr. John Elsey to Mr. Sewall, Secretary.

"Honorable Sirs:

By the last opportunity of conveyance, which was by

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John Anderson, we gave your Honors an account of what Col. Scarborough writ to Mr. Revell as concerning their claim to this place, and have ever since expected some instructions from the Hon'ble Lieut. Gen'l how we should answer him if he should come up. But as yet can hear none. Since the time of writing, my business drew me down to Accomack, where Col. Scarborough arrested me at his Majesty's suit, and made his demand for Obedience and Right for land, the copie whereof I have enclosed, and the copie of my answer to it, without which I could not have done my business, nor have returned home before I had been at Jamestown, where I do believe it would have been exacted more particularly. Col. Scarborough telling me that my answer was like to that of the Oracle of Delphos. When he had my response, he told me that if he could, he would be up with us before Jamestown Court, if not presently after, and make the same demand of every particular person, and on denial, would according to his order, set the Broad Arrow on the house of him that should refuse to give a satisfactory answer, and promises great protection on submission.

Now I beseech your Honors that you will, with what speed you can, urge his Lieut. to consider our condition, how we lie between Sylla and Charybdis, not knowing how to get out of the Labyrinth I could not understand but that he doth intend to come up with a competent company to force us, who are not in a capacity to defend ourselves against the Pagans, who doe grow very insolent and tell us we are *lyars*, and that our great men care not for us, because that none of them come to us.

I would gladly have waited on your honors, but cannot at present by reason of an extreme cold that hath seized on me. But because I would not have these miscarry, I have sent my friend, by whom I shall expect your answer, to the satisfaction of all the inhabitants, who do much desire to serve his Lordship faithfully, and live quietly under his protection and government, to enjoy what little goods they have

in peace, and not have it macerated and torn from them because they are ignorant. Thus hoping you will think of us and provide for our safety, that cannot help ourselves, I shall omit at present what further discourse I have heard, until it shall please God that I shall see you, and rest.

Your honor's ever faithful and ready serv't,

JOHN ELZEY.

Manokin, this —th.

March, 1662 (N. S. 1663) mark same distinction in following dates.

Col. Scarborough's demand.

"Mr. John Elzey:

This day, as I am his majesties Treasurer and substitute, I do demand of you obedience and acknowledgment to his Majesties dues in poynt of right for Lands and Government, which though hitherto upon some reasonable pretences you have declined, I have upon better information, and doe by these presents demand your immediate obedience to his Sacred Majesty in payment of Right for Land and Gov'nt, to which your answer and submission is required by me, his Majesties officer, this 23rd of February, 166$\frac{2}{3}$.

E. S.

Upon some delays and scruples made by Mr. John Elzey, I demand right of land in and upon the place where he lyveth, and submission to his Ma'ties government, being in a place now called Monanoakin, formerly in Smith's Map, Wicocomico River.

E. S.

Mr. John Elzey's Answer.

"Mr. Scarborough:

Honored Sir, having perused your demand of obedience and acknowledgement to his Majesties dues in poynt of Right for Government, I can give no other response than this—That I shall decline as long as I live all authority that shall not be derived from him, his heirs, or lawful successors, and

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am, and shall always be ready to yield obedience to them, that is or shall be, the Gov't by any authority, granted from him, or any of his lawful successors, and will willingly pay all such Rights and dues as shall be lawfully of me required, whether of Right of Land or otherwise, and soe shall I subscribe this 23d of February, 1662. J. E.

Upon reading of this letter, it is ordered

That a letter bee sent to Sir William Berkley, Governor of Virginia, from the Governor and Council signifying unto him, Colonel Scarborough's demand of obedience and acknowledgment to his Majesty in poynt of Right of Land, from the people inhabiting at Manoakin and Annamessick as well as submission to his Majesties Government of Virginia. And that on their part, they would appoynt a time, when we on our part shall attend on them to determine that place which shall be accounted Watkins' Point, according to his Lordship's Patent for Maryland."

The next historical document in the Maryland Records relating to this "difference" about "Watkins' Point" is the following, under date of June 3d, 1664, viz:

"Charles Calvert, Esq., Lieut. and Chief, Governor of the province of Maryland, under the Right Hon'ble Cecelius, Lord and Proprietary of the same. To all persons to whom these presents shall come, greeting. Whereas; divers persons, illwillers to the good correspondence of long time held between the government of Virginia and that of this province, have of late endeavored to raise differences between the said governments, touching the antient and known bounds between them on the Eastern Shore, and whereas the honorable Sir Wm. Berkley, Gov. of Virginia, did appoint Col. Edmund Scarborough, Mr. John Cattlett and Mr. Richard Lawrence, or any two of them, whereof the said Scarborough to be one, to give a meeting to the deputies or substitutes of this Government, by the Governor thereof to be appointed, (in case any dispute should arise where Watkins' Point was, that being the bound of this province,) to determine what

should be reasonably proposed by the said Deputies. In pursuance whereof, the said Col. Scarborough, without the said Cattlett or Lawrence, or convenient notice given to me, did about the tenth day of October last, in an hostile manner, enter many miles into this province, to the terror of the people at Manokin and Annamessex, beating, abusing and imprisoning the people there, by him long before seated by virtue of a Commission from this Government directed, and contrary to his certain knowledge of the bounds of the said province. And whereupon remonstrance of this undue proceeding to the Honorable Sir Wm. Berkley, by myself in person, he did not only disclaim any order from him to the said Scarborough alone, or before notice given, and debate had touching the point in difference, to proceed by force as he did, but was pleased further, by his order of the 28th of March last, to order the said Scarborough, with one or both the surveyors, Cattlett or Lawrence aforesaid, Capt. Joseph Bridger, Capt. Robert Elkison and Mr. Bulmer Mitford, to give a meeting to such Commissioners as should by me be appointed at Manoakin 10th May last, and in case of my refusal of that, so just a proposal, to proceed according as in that commission they were ordered. Now know ye, that for as much as neither the said John Cattlett nor Richard Lawrence appeared at Manoakin at the time appointed, without one of which nothing could be legally by the rest done, that did appear, and to show how we are not to be tired out of our desires of faire correspondence with the Hon'ble Gov. and Council of Virginia, I have constituted, ordained, appointed and impowered Philip Calvert, Esq., deputy Lieutenant, and Chancellor of this province, to repair to the Hon. Sir Wm. Berkley, Gov. of Virginia, and the Council there, and after delivery of a duplicate of these presents, and to treat and determine the said difference concerning Watkins' Point, also to demand justice against the sd Edmund Scarborough, for entering into this province, in a hostile manner, in October last, by blows and imprisonment, outraging the inhabitants of Manoakin and Annamessex,

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without Commission, as also for attempting to mark a tree, upon a point of land, above thirty miles to the northward of Watkins' Point, in Maryland, without Commission or order, and for publishing a proclamation at Manoakin on Monday, 16th of May, contrary to the order dated 28th of March aforesaid. I having appointed Commissioner, the said Philip Calvert, and Jerome White, Surveyor Genl., to meet at Manoakin aforesaid, who did accordingly come at the time and place appointed, which unless I had refused to do, they, the said Commissioners had no order to publish any command or proclamation whatsoever had they been present, (according to the tenor of the said order,) as they were not. And further to represent to honor'ble Sir Wm. Berkley the undue proceedings of the Assembly of Virginia, who undertake to take cognizance of things relating to this province and the people thereof. Whereas his Majesty of happy memory, by the charter hath by express words exempted both the province and the people thereof from the government of Virginia, and made both it and them dependant only of the Crown of England; and to desire of him, the said Sir Wm. Berkley, to take care for the future that the Assembly meddling with things relating to us, and beyond their power, be no cause of future difference between us, which we in our Assembly, on our part, shall industriously avoid. Whereof I desire that the said Philip Calvert may be credited and believed, promising to ratify and confirm whatsoever shall be done by him according to this my commission, as if it were done by myself. Given at St. Maries' under my hand and the lesser seale of this province of Maryland, this 3rd day of June, 1664."

We learn from this document the only connected account of the proceedings of the Governor and Council of the two Colonies, subsequent to that order of the 8th of April, 1663. It appears from this document that in response to the representations made to Governor Berkley under the order of April 8th, 1663, he appointed Col. Scarborough, Mr. Catlett and Mr. Lawrence, or any two of them, whereof Col. S.

to be one, to give a meeting to the deputies or substitutes of Maryland, in case any disputes should arise, where Watkins' Point was, that being the bounds of this province. That Scarborough, without Cattlett or Lawrence, or notice to the Governor of Maryland, invaded Maryland, in a hostile manner, about the 10th October, 1663. That remonstrance against "this undue proceeding" was made to Gov. Berkley by Gov. Calvert in person. That Gov. Berkley not only disclaimed any order from him to Scarborough alone, or before notice and debate had been, touching the point in difference, but by order of 28th March, 1664, directed Scarborough, with one or both the Surveyors, (Cattlett and Lawrence,) Capt. Bridger and the others named, to give a meeting to the Maryland Commissioners on 10th of May, 1664. That neither of the Surveyors, Cattlett or Lawrence, appeared at Manoakin at the time appointed, although Philip Calvert and Jerome White, Commissioners appointed by the Gov. of Maryland, met at the appointed time at Manoakin; but that Scarborough was there in May, 1664, and attempted to mark a tree upon a point of land above 30 miles north of Watkins' Point, and on 16th May, 1664, published at Manoakin a proclamation contrary to his orders. That by that document of June 3d, 1664, Philip Calvert was commissioned to repair to the Governor and Council of Virginia, to deliver a duplicate of the paper, and to treat and determine the said differences concerning Watkins' Point, "also to demand justice against the said Scarborough for invading this province with force of arms, outraging the inhabitants of Manoakin and Annamessick, and for his other acts complained of. And further to represent to Gov. Berkley the undue proceedings of the Assembly of Virginia, who had undertaken to take cognizance of things relating to this province, contrary to the express words of Lord Baltimore's Charter."

The under proceedings of the Virginia Assembly here referred to, were doubtless the Act of 2d September, 1663, entitled "An Act concerning the bounds of this colony on the Eastern Shore."

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By this Act the Assembly "concluded the same place of Watkins' Point to be the North side of Wicomico river on the Eastern Shore, near unto and on the South side of the straight 'Limbo,' opposite Patuxent, which place, according to Capt. John Smith, in the year 1608 was so named." It is highly probable that the Assembly as well as the "five able, selected, Surveyors, and two burgesses," on whose report the Assembly based their action, was mainly if not entirely influenced by the opinion and representations of Col. Scarborough. He had been for many years a resident of the Eastern Shore and member of the house of Burgesses, and was Surveyor General of Virginia. He had commanded the Virginian forces on the Eastern Shore, in the wars against the Indians, and doubtless had traversed the country and was better acquainted with the territory than any other person in the two colonies. But he had evidently read Smith's History and Map to little purpose, and had jumped to his conclusions with reckless audacity. This is shown by his demand upon Mr. Elsey on the ground that the place of his residence at Manoakin was formerly in Smith's Map called Wicocomico river.

We think we have already shown that a careful examination and comparison of Smith's History and Map together, will leave no doubt that the only Wighco, (or Wighcocomico river, as it is called in the History,) on the Eastern Shore, mentioned by Smith, or of which he had any knowledge, is the present Pocomoke. On the map, Smith has located the Indian king's house, "Wighcocomico," on or near the south bank of the Wighco, and he has located no river between the Wighco and Cuscarawaock, (the Nanticoke,) although the Little and Great Annamessick, Manoakin and Wicomico rivers intervened between them. In the same way he passed by, without discovering, the rivers Chester, Wye, St. Michaels, Great and Little Choptank, and the Blackwater and Transquaking rivers, between the Tockwough (the Sassafras) and the Nanticoke.

The error of the Virginia Assembly, apart from its total want of jurisdiction over the question, is still more remarkable. We presume it originated in misapprehending a line on 183d page of I vol. Smith's Hist., namely, "Watkins,—Read's and Mumford's poynts are on each side of Limbo." But this gives no certain idea of the location of any one of them. A glance at Smith's map, however, shows that Mumford's Point was north of Limbo, and must have been at the southern end of Hooper's Island, (though not known to Smith to be an Island,) and that Watkins' Point was 30 miles south of Limbo, and was the North Point at the mouth of the Wighco; while Read's Point was further up and on the same side of the Wighcocomico river, probably, at the point now known as Williams' Point, below Shelltown.

The claims founded on these errors were subsequently abandoned. Meantime the Maryland authorities continued to claim to Watkins' Point, as described in the Charter, in every document which related to the bounds of the province on the Eastern Shore. Thus, in a Commission from Gov. Calvert, dated 26th March, 1664, to Wm. Coleburne, to be Lieutenant under Capt. Thorne, of the foot company to be raised by him, "between Choptank river and a line drawn East into the Mayne Ocean from Watkins' Point, *being the North Point of the Bay into which the river Wighco, formerly called Wighcocomoco, afterwards Pocomoke, and now Wighcocomoco again, doth fall exclusively.*"

Again, in a Commission dated 26th May, 1664, to Stephen Horsey, Capt. Wm. Thorne and Wm. Bozman, to grant lands "upon the Eastern Shore of this province, in any place between Choptank river and a line drawn east into the main ocean, from Watkins' Point, *being the North Point of the Bay, into which the river Wighco* (formerly called Wighcocomoco, afterwards Pocomoke, and now Wighcocomoco again) doth fall, exclusively." Liber H. H., folios 197–198.

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Again, in a Commission dated Sept. 2d, 1665, to Capt. Wm. Thorne, to command, as Capt. all the forces "on the Eastern Shore of this province, from Wicocomoco that joynes upon Maniy (meaning Monie Bay, into which it flows,) to that part of Pocomoke, on the said Eastern Shore, that is, or shall be inhabited, within this province."

A distinction here is clearly drawn between the river now called Wicomico, then Wicocomoco, emptying into Monie Bay, and the Pocomoke, or Wighcocomoco of Smith, which fell into the Chesapeake Bay at Watkins' Point.

And again, in the Letters Patent of Cecelius, Lord Baltimore, erecting the County of Somerset, dated 22d of August, 1666, he describes the bounds thus: "all that tract of land within our province of Maryland, bounded on the South with a line drawn from Watkins' Point, (being the North Point of the Bay into which the River Wighco, formerly called Wighcocomoco, and afterwards Pocomoke and now Wighcocomoco, againe doth fall, exclusively,) to the Ocean on the East; Nanticoke river on the North; and the Sound of the Chesipiake bay on the West." H. H., folio 268. Recorded in full in the Records of Somerset County, in Liber B., fol.

In the division of the County into Hundreds, January, 1667, Annemessex Hundred is thus described: "Beginning at Watkins' Point, running to the mouth of Merumsco Creek, up the Westernmost side of the said Creek, to Merumsco dams, and from Watkins' Point to the North Point of Annemessick River," &c.

The particularity in the description of the location of Watkins' Point in all the official documents of Maryland in which it was named after February, 1663, was doubtless caused by the attempt of Col. Scarborough at that time to create a doubt as to its true location.

That this was the true original location, and that Watkins' Point originally extended so far south as to be west of

Onancock River, and that the proclamation of 4th October, 1638, was recognized by the people of both Colonies, down to 1663, as correctly describing the bounds of Maryland, we think may be fairly inferred from a passage in Col. Scarborough's account of his military expedition to Annamessex and Manokin, in October of that year. It was addressed to the Governor and Council of Virginia. Describing his interview with the settlers at Manokin, Col. S. says:

"Some of them also discoursed of the Lord Lieutenant of Maryland's claim to Manokin and all other places to Anancock; to which it was answered, *that whilst the erroneous proclamation was uncontradicted, that declares Anancock to be Maryland's Southern bounds, it might be so received, but since occasion made the Government of Virginia not only reverse that proclamation, but also by this present Act of Assembly, ye certain bounds of Lord Baltimore's Patent was declared*, and if the Lieutenant had aught to say, he was referred by the Act to persons and place. Therefore they need not trouble themselves therein, for the question appertained to higher powers and above private men's controverting; at which they were well satisfied, and desired protection of their persons and estates, from any pretenders under the said Lord, which being assured them, they departed well satisfied."

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It would appear from Col. Scarborough's account, that he deemed it nothing short of rebellion in Lord Baltimore's officers and the people of Annamessick to question the authority of an Act of the "Grand Assembly" of Virginia, "not only to reverse that proclamation," but also to declare "the certain bounds of Lord Baltimore's Patent."

The two depositions made on 19th July, 1664, in the Court of Accomack, as to the location of Pocomoke River and Watkins' Point, (a copy of which was submitted to us by the Virginia Commissioners,) have received respectful consideration. That of Capt. Wm. Jones states that 35 or 36 years before that date, he often sailed, trading with the

Indians in the Chesapeake Bay, and well knew the River of Pocomoke, "which lyeth to the southward of a little point described in Capt. Smith's Map, without a name, and is so far southward as a man can see from the place described in Capt. Smith's Map for Watkins' Point, and that the said river Pocomoke was then soe called, and no such name as the river Wighco, either at that time or the memory of man before, was applied to the river Pocomoke, and that ever since, the said river has been and is called by the name of Pocomoke."

The other is the deposition of Edm. Scarborough and the same Capt. "Will Jones," and six others, who state that they "have of long time past heard of and known the river Pocomoke, and that the said river hath been so called time out of mind, both by the report of the Indians and knowledge of the subscribers, and is to this day so called, being a river on the Eastern Shore of Chesipiak Bay, in Virginia, lying to the southward of a small spiral point on the south side of Annamessick, and that point is to the southward of the place described in Capt. Smith's 'Map for Watkins' Point' so far as a man can see in a clear day, and that the said river of Pocomoke, and so situate as aforesaid, is so called to this day."

We understand the first deposition to state in substance, that the deponent knew the Pocomoke river about 1627 or 8, that it (the river) is so far southward of a little point on Capt. Smith's Map without a name, as a man can see from the place described for Watkins' Point in Smith's Map; and that no such name as the Wighco either then, or in the memory of man before, was applied to the river Pocomoke. Capt. Jones could only testify to what he had heard or known; his knowledge began some 20 years after Captain Smith's explorations, and against Capt. Jones' statement that the river never was called Wighco, in the memory of man, are the History and Map of Capt. Smith, published first in 1612 and again in 1629, calling that river "Wigh-

co Flu.;" although Capt. Jones and the other deponents had never *heard* it so called, but only had *heard* it called Pocomoke in their day. The second deposition, as written, does not seem to be reconcileable with the first. The first describes the location of the *Pocomoke* as so far south of a small point, without a name in Smith's Map, as a man can see from Watkins' Point. In other words, that the small point was so far *north* of the river Pocomoke as a man could see from Watkins' Point. The second deposition states that the river Pocomoke lies to the southward of a small spiral point on the south side of Annamessick, and *that point* is to the southward of the place described in Smith's Map for Watkins' Point. If both depositions refer to the same point "without a name" in Smith's Map, and that point was on the south side of Annamessick river, it certainly must have been north of Watkins' Point, as located on Smith's Map.

We think the depositions utterly fail to rebut the evidence herein adduced as to the identity of the Wighco and Pocomoke and the true location of Watkins' Point. And we conclude with Bozman that "Watkins' Point must have been the southern promontory of Somerset County, on the Bay, and what may be termed the exterior cape of Pocomoke Bay." I Bozman's Md., 132.

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And we are further of opinion that, that southern promontory was, subsequently to the Charter, broken by the action of the water into the Islands since called Fox's Islands and Watts' Islands; and that "the most southern promontory or exterior cape of Pocomoke Bay," since called Watts' Island, was formerly Watkins' Point, described in Lord Baltimore's Charter. That it was at one time a continuous neck of land to the southern end of Watts' Island cannot be doubted.

How far south the point of land at the southern end of the promontory actually extended, at the date of the Charter, 230 years ago, can only now be ascertained with probable certainty. From the shape of the shoal south of Watts' Island,

as shown by the U. S. Coast Survey, the extent of the washing away may be inferred, but we submit, that the Virginia proclamation of 1638 furnishes, by implication, the most certain evidence of its former true location. An east line to the ocean from that point was Maryland's true southern boundary on the Eastern Shore.

We proceed now to consider

"*The Calvert-Scarborough Line.*"

We have found no other reference in the Maryland records to the disputed southern boundary on the Eastern Shore, after Gov. Charles Calvert's letter, or Commission, to Philip Calvert of the 3d of June, 1664, except what has already been stated. The next entry on the Maryland records relating to this subject is entitled:

"A list of Lands surveyed and entered in the office of Virginia and patented, that now fall in Maryland:

	Acres.	
*Robert Huiston, (Holston?)	500	
John Williams,	400	
James Henderson,		These have their Patents.
Thomas Davis,		
John Davis,		

	Acres.
Pte. of Edmund Scarborough,	3000—Patented.
Capt. Bowman and Mr. Littleton,	3000—Past the office.
Lt. Col. Waters and Mr. Robins,	4000—Past the office.
Thos. Purnell,	550—Past the office.
Edward Smaller,	500—Patented.
Daniel Silby,	600—Patented.

*The name was *Holston*. The creek mentioned in the patent is now called Holston's Creek—and these are the lands mentioned in the agreement dated 25th June, 1668, as the land of Robert Holston, near to which they "marked certain trees." This land was subsequently granted by Lord Baltimore to Robert *Houstons*, (so in patent.) The patent recites these articles of agreement between his brother, Philip Calvert, and Col. Edmond Scarborough, and states that Robert Housetone, of Colony of Virginia had surveyed a tract of land in Somerset County of 500 acres, which is now falles within the said divisional line, and grants all that parcel of land called the Assurance, in Somerset County, on south side of Pocomoke river, bounded northwestward partly by Pocomoke river and partly by Housetone's Creek and its main branch, &c., containing 500 acres.

Col. Scarborough also got a patent from Lord Baltimore for the two tracts of 3000 each.—*I. D. Jones.*

John Pike,	400—Patented.
Robinson's Children, Thomas Richard,	1050—Past the office.
John Paramore,	1500—Patented.
Robt. Johnson,	600—Patented.
Stephen Barnes,	600—Patented.
William Brittingham,	700—Past the office.
Thomas Smith,	400—Past.
Henry Bishop,	2300—Past.
Thomas Selby,	1250—Past.
Alexander Williams,	600—Past.
Robt. Richardson,	2000—Past.
Edward Smith,	700—Past.
Richard Smith,	200—Past.
Francis Benstone, formerly John Wallops,	to produce.
Edmund Scarborough,	3000.

"Whereas the lands belonging to the persons above mentioned are found, since the lines are laid out on the Eastern Shore in Somerset County, to be within this province of Maryland; I do hereby promise to ratify and confirm by virtue of his Lordship's instructions to me directed, every of the said Lands by Patent or Grant under the Great Seal of this province, to each respective person, upon demanded within seven years' time, allowed each person for the making good their right for every of the said lands, so by them first surveyed on Virginia part, and now to be holden by his Lordship's grant, within this province, at 50 acres for every right of land, so by them to be made good, according to his Lordship's Conditions of Plantations.

Given under my hand this 11th day of June, 1668.

CHARLES CALVERT."

From extracts taken from the Books of Virginia Land Patents, in possession of the Virginia Boundary Commissioners, at the joint meeting at Crisfield, these lands ap-

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pear to have been patented mostly in 1664, 1665, and 1666. These extracts enable us to supply the number of acres left blank in the "list," viz: James Henderson, 400 acres; Thos. Davis, 400; John Davis, 700—all patented April 5th, 1666; John Wallop, 400 acres on Pocomoke river and 3050 acres at Gingoteague, 10th June, 1664, which added to the above number of acres in the "list," make nearly 33,000 acres taken up by Col. Scarborough and his friends within the limits of Maryland, (according to the line of 1668,) pending the controversy as to the true location of Watkins' Point. It will be found on examining the Virginia Records, that all these lands were situated between the southeast bank of the Pocomoke river and the ocean, in what is now Worcester County, Maryland.

The following is a copy of the two agreements between Calvert and Scarborough of June 25th, 1668, as contained in the Maryland "Council Book, 1669 to 1673":

"Articles of agreement between Philip Calvert, Esq., Chancellor of Maryland, deputed by the Hon. the Governor of the said Province, to treat and conclude upon the Bounds of the said Province, and Col. Edmond Scarborough, his Majesty's Surveyor Genl. of Virginia, authorized and Commissioned to lay out the Bounds of Virginia.

I. Imprimis. It is agreed that all persons who have surveyed or patented and seated land on the seaboard side in the Right of Virginia, and now fallen within the divisional line, shall enjoy their said lands, they taking a patent from the Lord Proprietary of Maryland, and within seven years entering rights in the said Province, and paying the half fees to the Surveyor Genl. and full fees to the Secretary and Chancellor.

II. Item. All such as have already patented any lands in right of Virginia in any other place within the line aforesaid, which is not also patented in Maryland, shall have the privilege in the foregoing articles, upon such terms as in the said Article is expressed.

III. Item. All such as have patented and seated lands in right of Virginia which do fall within the line aforesaid, and are patented likewise in Maryland, but not seated in the same right, shall enjoy the same, unless it can be proved they have seated said lands in defiance and despite of the said Government, after warning given, provided they take Patents, enter rights and pay *fees*, as in the first Article is agreed.

IV. Item. If any land shall chance to be patented in right of Virginia, for which there is also a patent in Maryland, the patent in Maryland shall carry the land. In witness whereof the said Philip Calvert and Edmund Scarborough have hereunto set their hands the 25th day of June, 1668.

Signed PHILIP CALVERT,
EDMOND SCARBOROUGH."

"Whereas his Royal Majesties Commission to the Surveyor Genl. of Virginia, commands setting out the bounds of Virginia, with a reference to his Majesty's Hon'ble Governor and Council of Virginia, from time to time to give advice and order, for directing the said Surveyor General to do his duty appertaining to his office. In order thereunto his Majesty's Hon'ble Governor and Council have by letter moved the Hon'ble the Lord Baltimore's Lieut. Genl. of Maryland to appoint some fitting person to meet upon the place called Watkins' Point with the Surveyor Genl. of Virginia, and thence to run the division line to the Ocean Sea, &c.

The Hon'ble Philip Calvert, Esq., Chancellor of Maryland, being fully impowered by the Hon'ble Lieut. Genl. of Maryland, and Edmond Scarborough, his Majesty's Surveyor Genl. of Va., after a full and perfect view taken of the point of land made by the north side of Pocomoke Bay and the south side of Annamessex Bay, have and do conclude the same to be Watkins' Pt., from which said point, so called,

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we have run an east line, agreeable with the extremest part of the westernmost angle of said Watkins' Point over Pocomoke river, to the land near Robt. Holston's, and there have marked certain trees, which are so continued by an east line, running over Swanscoute's Creek, into the marsh of the seaside, with apparent marks and boundaries, which by our mutual agreement, according to the qualifications aforesaid, are to be received as the bounds of Virginia and Maryland on the Eastern Shore of Chesapeake Bay.

In confirmation of which concurrence have set our hands and seals this 25th day of June, 1668.

Signed PHILIP CALVERT, [SEAL.]
EDMOND SCARBOROUGH, [SEAL.]"

This is the only record of the transactions found among the Maryland archives. No journal of proceedings, no map or plat, no notes or certificate of survey, no mention of the names of the surveyors employed in running the line, can be found among our records. And we understand that no record of this agreement whatever is found in the Virginia archives; or was found by Col. McDonald or Col. De Jarnette amongthe colonial records in London.

Sixty years had elapsed since Capt. Smith and his crew named Watkins' Point—and 36 years since Charles I. had adopted that point as the spot from which the divisional line on the Eastern Shore, between Virginia and Maryland, should run to the ocean.

A controversy had for several years existed as to the true location of this point. The Surveyor General of Virginia and the Chancellor of Maryland were empowered to meet upon the place, and thence to run an east line to the ocean. They concluded "the point of land made by the north side of Pocomoke Bay and the south side of Annamessex Bay to be Watkins' Point." If Lieut. Michler was correct in 1858 in assuming that "the mouth of the big Annamessick River" may have once given rise to the name "Annamessex Bay," mentioned in the Calvert and Scarborough agreement,

and our conclusion is correct, that in 1668 the neck of land since broken up into Fox's and Watts' Islands extended unbroken to a point west or nearly west of Onancock river; or even the islands themselves so extended, (for the mouth of Pocomoke River is south of Watts' Island,) then "the place called Watkins' Point" must have extended nearly twenty miles from north to south. Michler would hardly have come to such conclusion, but that the prolongation westward of the Calvert-Scarborough line, from Pocomoke River to Tangier Sound, reached the Sound after crossing little Annamessex River north of the mouth of that river. He would scarcely have supposed that a point made by the north side of Pocomoke Bay would have extended beyond the mouth of the next river to the north of Pocomoke, especially as he, by a mistake, supposes the neck of land, known as "little Annamessex," to extend to the big Annamessex River. It is well known that "little Annamessex Neck" extends only from the south and east shore of little Annamessex River to Cedar Straits and along the north shore of Pocomoke Bay to East Creek, and that the neck of land between little and big Annamessex is known as "Annamessex Neck." If Watkins' Point was formed by Pocomoke Bay on the south and east and Tangier Sound on the west, no geographical definition of a "promontory" or "point of land" would carry its northern limits beyond the mouth of little Annamessex River. The words "promontory," "head land," "place," and "point," which are all used in the charter to indicate the spot or point of departure of the divisional line to the ocean, are commonly understood to describe a tract of land extending out into a bay or river beyond the line of the shore, and becoming narrow at the end, which is therefore usually called "the point," and is always understood to mean "the extremest part" of the "angle," when the word "point" is used to indicate a boundary. Thus when the bounds of St. Mary's County were particularly prescribed by the Act of 1695, ch. 13, confirmed and made perpetual by ch. 92 of 1704, it was declared "that

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St. Mary's County shall begin at Point Lookout and extend up Potomac River," &c. Who would suppose that by "Point Lookout," in these Acts, was meant "the point of land made by the north side of" Potomac River and "the south side" of Patuxent River? a tract of land which includes seven or eight other distinct points. So also in the letters patent of 1666, erecting Somerset County,—"bounded on the south with a line drawn *east from Watkins' Point*, being the north point of the Bay," &c. And again in describing the bounds of Somerset and erecting Worcester County, by the Act of 1742, ch. 19, "beginning at Watkins' Point and thence running up Pocomoke Bay," &c. It would seem impossible to doubt that in all these descriptions the end of the point where it was washed by the waters of Pocomoke Bay and Chesapeake Bay, into which it extended, was meant as the point of departure.

But the Calvert—Scarborough Agreement concluded otherwise. "After a full and perfect *view* taken of the point of land made by the North side of Pocomoke Bay, and South side of Annamessex Bay, have and do conclude the same to be Watkins Point." It is not stated, that any other evidence, traditionary or otherwise, had aided their "view" or conclusion. A point of land of such extent from North to South must have some limits from East to West. These are not expressly given, but evidently must have been, Tangier Sound on the West, and Pocomoke River on the East; a distance of about 15 miles apart.

Their commission "to meet upon the place called Watkins Point" of course empowered them to determine what, and where, was the "place."

This they did as their report certifies. Their next duty was "thence to run the divisional line to the Ocean Sea, &c." This also, they certify they did, to wit: *from which said point* so called," (that is *from* the point of land made by the North side of Pocomoke Bay, and South side of Annamessex Bay,) "we have run an East line agreeable with

the extremest part of the Westermost angle of the said Watkins Point, over Pocomoke River, to the land near Robert Holston's, *and there have marked certain trees*, which are so continued by an East line, running over Swansecute Creek, into the marsh of the sea side, with apparent marks and boundaries, which by our mutual agreement, according to the qualifications aforesaid are to be received as the bounds of Virginia and Maryland on the Eastern Shore of Chesapeake Bay."

We think there is internal evidence, that this agreement was drawn up by Col. Scarborough. We suppose Chancellor Calvert was instructed to agree to the best attainable line. We will give the reasons for this opinion hereafter.

It is manifest that the attempt of Col. Scarborough and the Virginians to establish the location of Watkins' Point, at the Manokin or Wicomoco Rivers had utterly failed and been abandoned.

It has been shown that the Virginia Grants between the Pocomoke River and the Ocean, had, pending the controversy, extended far North of Watkins' Point, as claimed by Lord Baltimore. It has not been, and we confidently assert, that it cannot be shown that Virginia ever granted a foot of land, north or west of the Pocomoke Bay or River, and east of Tangier Sound, except Fox's and Watts' Islands, which were granted long after the Calvert and Scarborough line was run.

Col. Scarborough's invasion and "undue proceedings" at Annamessex and Manokin in October, 1663, were utterly repudiated and disclaimed by the Governor and Council of Virginia; and from that time to this every foot of land north of Cedar Straits and Pocomoke Bay and River and east of Tangier Sound, has been claimed and held under Maryland grants, and governed by Maryland laws, as a part of Somerset County. When Col. Scarborough made his expedition to Annamessex in October, 1663, he states that he found Stephen Horsey settled upon lands granted by, and holding

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a Commission as Justice of the Peace from, Lord Baltimore, and strenuously, in the presence of the Colonel and his 40 armed horsemen, refusing to recognize the authority of the Virginia Government. It is evident that the line, if ever run at all, for any purpose, from Jane's Island, had been run across this very land of Horsey's, and if intended as a divisional line, has left a part of it in Virginia. This is shown by the prolongation westward, by Michler, in 1868, crossing this identical land, then owned and occupied by the descendants of Stephen Horsey, the original patentee.

The prolonged line crossed this and other lands in the same predicament, in its entire course from the right bank of the Pocomoke River to Tangier Sound. Other lands also south of that line, and between it and Pocomoke Bay and River, had been granted by Maryland before 1668, and certainly if Virginia had intended to claim jurisdiction over the territory south of the line and north of Pocomoke Bay, similar and reciprocal provisions to obtain grants from Virginia, to confirm the title of the settlers, would have been included in the articles of agreement. But the articles of agreement relate only to the Virginia grants lying to the north of the division line between the Pocomoke River and the ocean. The land owners under Virginia titles, north of that line, had been ascertained by running the line to the ocean. A list of them had been made and submitted to Gov. Calvert, and his written promise, under instructions from Lord Baltimore, to confirm their title by grants from his lordship, had been obtained, on the 11th day of June, 1668, 14 days before the articles of agreement for quieting possession were signed by Calvert and Scarborough. The articles consist of four items: 1st. Lands on the seaboard surveyed or patented and seated in right of Virginia, and now fallen within the divisional line to Maryland; 2d. Lands patented by Virginia in any other place within the said line, and not also patented in Maryland; 3d. Lands patented and *seated* in right of Virginia within the said line, and patented likewise in Maryland, but not *seated* under said patents, unless the

lands have been *seated* in defiance of the Maryland government, after warning given. All these were to enjoy their lands upon taking a patent from the Proprietary of Maryland; 4th. Land *patented*, only, in right of Virginia, for which also there is a patent in Maryland, the Maryland patent shall carry the land.

There is not the slightest intimation in these articles that Maryland had granted any land which, by the running of the divisional line, had fallen within the jurisdiction of Virginia. And not only were Horsey and others left in the undisputed and undisturbed possession and enjoyment of all their lands already granted by Lord Baltimore, but all of the remaining unpatented lands south of the prolonged line upon the north side of the Pocomoke River and Bay down to Cedar Straits and Tangier Sound were, after 1668, granted, occupied and governed as Maryland territory, in as full, free and unquestioned a manner as any other lands within the admitted limits of the Charter. And the records of Somerset County show the transmission of title from the patentees by deeds, wills and descent, and judicial sales, down to the present owners. It was but natural under the circumstances that Col. Scarborough should desire to fix the line, between Pocomoke River and the ocean, as far north as possible, so as to keep their land, for which they had obtained grants from Virginia, under the Virginia jurisdiction.

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If he could have shown that "the extremest part of the westernmost angle" of the point made by the big and little Annamessex rivers was the Watkins' Point of the Charter, there could have been no doubt that the divisional line must have run thence, by the shortest line, to the ocean. But this was impossible. Hence the necessity to make Watkins' Point cover a very large extent of territory. After having agreed upon its limits, it became necessary to fix the point of departure *from* the point so described and "so called" to the ocean. That point of departure must be *from* the termination of Watkins' Point on the Pocomoke River, be-

cause the preposition "from" is exclusive. If the Pocomoke River was not the eastern bound of Watkins' Point, as described in the agreement, where was the eastern bound? Big Annamessex River or Bay was on the north; Pocomoke Bay on the south; and certainly the Sound, (then sometimes called Nanticoke Sound, but since known as Tangier Sound,) was its western bounds. Then, where but at the Pocomoke River was its eastern bound?

To ascertain the point of departure on the Pocomoke River towards the ocean, they state, we have run an east line (not *from*, but) "agreeable with," (that is to say corresponding with) "the extremest part of the westernmost angle of the said Watkins' Point over Pocomoke River to the land near Robert Holston's." The theory upon which they had agreed left them no alternative. They were to run the line east *from* Watkins' Point, not across it. If they agreed upon such a theory about what was Watkins' Point, they must abide by its logical results. Having fixed its northern and southern and western limits on Tangier Sound, they could not be certain how far north, within those limits, they could start for the ocean, on and from the Pocomoke River, without first having ascertained it, in some mode, by fixing upon a point on the Sound, within those limits, with which the line over the Pocomoke River to the ocean should be "agreeable," or correspond. If any line was actually run from a point on Tangier Sound to the right shore of Pocomoke River, we can conceive of no other purpose of such a line, consistently with their report and existing facts, than to ascertain the spot of departure, on that river, towards the ocean. If such line was ever run from the westernmost angle of Jane's Island, it traversed a space of more than 15 miles from sound to river; crossing in its course little Annamessex River, Apes Hole Creek, East Creek and Merumsco Creek; and the whole line, at that time, was probably thickly set with large trees. It is impossible to conceive an adequate reason why, if the line was run as part of a permanent boundary between Maryland and Virginia, they should not

"have marked certain trees" at the beginning, and "so continued, with apparent marks and boundaries," to the Pocomoke River. That they did not do this, their report most clearly implies. And hence McDonald and Lee, Commissioners in 1858, in their first instructions to Lieut. Michler to trace the line in question, state: "It is supposed that there is still standing some old marks of the Scarborough line," and add: "It is inferred from documents in possession of the Commissioners that the Commissioners of 1668 *did not mark the line west of the Pocomoke, and that in all probability you will find no mark to guide you.*" And after Michler had run the prolonged line westward from the Pocomoke River to the Sound, at Jeans' Island, he reported that "no boundary line marks of any kind were found west of the Pocomoke, and the inhabitants professed to be in ignorance of the existance of any." The same result attended the inquiries of the present Commission, after the most diligent and thorough examination, on oath, of many of the oldest and most intelligent citizens now residing on and in the vicinity of the prolonged line.

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Again—if the line from "the extremest part of the westernmost angle" was to be the boundary from the Sound to the Pocomoke River, there was certainly as much necessity of marking the beginning on, or near, the Sound, where the land was washing away, as there was for making the beginning of the line eastward at and from the crossing of the Pocomoke River.

That "westernmost angle" must have been "the point without a name," laid down on Smith's map, and described in the depositions of Capt. Will Jones, Col. Scarborough and others, made in 1664, apparently for the purpose of indicating that point as the true Watkins' Point. That "point without a name on Smith's map" must have been situated between the mouths of the little and the big Annamessex rivers.

It was the only point of high land on the main for 20 or 30

miles northward after leaving the neck or islands of high land at the mouth of the Pocomoke River or Bay. The rest of the country was "low broken marshes." That point of land afterwards became known as Jeans' Island. In 1668 it must have extended perhaps 3 or 4 miles from the present shore line, southwesterly, into the Sound. It has since been entirely washed away, leaving but a low, narrow, sandy beach between the Sound and an extensive marsh. But a long narrow shoal, reaching far out into the Sound, and the southwesterly direction of the sound channel, the waters being forced there by the high land on the main, indicate its former locality. Living witnesses testified before the Commissioners their recollection of it, when the point was a high clay bank, some 12 to 15 feet above the water, and when wheat was grown upon it. There are traditions of a peach orchard where the light-boat was formerly anchored, considerably farther out from the shore than the present light-house on that shoal. Michler, in his report in 1858, states that, "Although the angle of this point of land is even at this day the most western one, still many years ago the land made out into the Sound a much greater distance. Jane's Island is said by Capt. John Nelson, aged seventy-two years, to have extended, within his recollection, to the present position of the light-ship, now anchored about a mile and a half from the present shore line." The north end of Fox Island at Cedar Straits was and is more western than Jeans' Island.

It must have been evident to Calvert and Scarborough in 1668, that all the points of land upon that shore were constantly and rapidly washing away by the action of the wind and water. Hence the necessity of some marks upon the land near by, not liable to such change. But there being no such marks found, and no record or tradition of any, the location of the "westernmost angle" has become impossible of any certain identification, notwithstanding Michler's supposition that the anchorage of the light-ship was very near the initial point of the Scarborough line. But no such result

has attended the boundary line on the land east of the Pocomoke. Upon reaching "the land over the Pocomoke River, near Robert Holston's," they "there marked certain trees, which are so continued by an east line, &c. to the seaside, with apparent marks and boundaries, which by our mutual agreement, according to the qualifications aforesaid, are to be received as the bounds of Virginia and Maryland." Michler's report states that "Along the whole length of the line between Chingoteague Bay and the Pocomoke River, a distance of between eighteen and nineteen miles, there were existing of such marks, at the time of the survey, thirty trees; one gate; the site of the ruins of an old house, standing at the time the Scarborough line was run; two State roads located on the line, measuring nearly ten thousand, eight hundred feet, making in all one mark for every half mile." And not a mark, or tradition of a mark, along the entire prolonged line of 15 miles west of Pocomoke River to Tangier Sound!

We submit that these facts are utterly irreconcilable with the idea that a continuous land-line of 15 miles from the Sound to the Pocomoke River was ever run, or if run, was intended to be considered as "a divisional line between Virginia and Maryland;" and that the east line of "marked trees" and of other "apparent marks and boundaries" from the Pocomoke River to the seaside was the only divisional line run from the Watkins' Point "so called" and so agreed upon "as the bounds of Virginia and Maryland;" thus leaving the whole of Watkins' Point, as described and agreed upon by them, within the limits of Maryland, as the evident meaning of the Charter required. The Charter line, as we have seen, called for "a right line drawn from Watkins' Point on the west, unto the main ocean on the east:" "so that the whole tract of land divided by the line aforesaid between the main ocean and Watkins' Point, unto the promontory called Cape Charles, may entirely remain forever excepted to us, our heirs and successors."

This theory of the Calvert-Scarborough line leaves the

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water line of the Pocomoke River and Bay to follow the Watkins' Point, "so called" in their agreement, to the Chesapeake Bay, as the divisional line separating Virginia and Maryland westwardly from the land near Robt. Holston's, on which stood the "certain marked trees."

It has been already remarked, that the theory that Jane's Island was the westernmost angle of the Watkins' Point described in the agreement, is based solely upon the fact that the prolongation westward of the marked line reached Tangier Sound at Jane's Island.

In point of fact, it was not the most western angle. All the indications, as well as tradition, show that the most western angle was at the northern angle of the neck of land, which we suppose at that time to have extended from Annamessex marsh to nearly west of Onancock River, and which northern end subsequently became Fox's Island. Within the memory of living witnesses the northwestern angle of that Island extended far out into the Sound, and was heavily wooded with large pines. The stumps still remain far out into the water. This fact (especially when considered in connection with the traditions from old Mr. Nelson—the father of the John Nelson mentioned by Michler—that he had always heard that the divisional line between Virginia and Maryland crossed the north end of Fox's Island,) would have indicated that place as the "westernmost angle of Watkins' Point," mentioned in the Calvert-Scarborough agreement.

The bay since known as Pocomoke Bay, as located on Smith's map, ran west about twelve miles; so that an east line, run "agreeable with the extremest part of the westernmost angle" of the land, afterwards formed into Fox's Island, would have passed over the water of Pocomoke Bay for some twelve miles or more, and thus being a water line, it was of course impracticable to indicate its locality by "apparent marks and boundaries." And this line, according to the location of Pocomoke bay and river on Smith's

map, probably reached the east shore of the river "near the land of Robt. Holston's," as mentioned in the agreement. The waters of Tangier Sound and Cedar Straits now cover the locality of that northwestern angle.

It is not, we think, difficult to show, by Smith's History and map, that the "point without a name" on the map between what are since known as the mouths of big and little Annamessex rivers, was a totally different point from Watkins' Point, which is located and named on the map. In Dr. Russel's account of the exploring expedition up the Eastern Shore, (I. Smith's Hist., p. 114,) it is stated that, after leaving the river Wighcocomoco and having passed Russel's (now Tangier) Isles,* "falling with a high land upon the main, found a great pond of fresh water, but so exceeding hot, we supposed it some bath; *that place we called Point Ployer*, in honor of that most honorable house of Mousay, in Brittaine, that in an extreme extremity once relieved our Captaine. From Wighcocomico to this place all the coast is low, broken Isles of Morass, grown a mile or two in breadth and ten or twelve in length, good to cut for hay in summer and to catch fish and fowl in winter; but the land beyond them is all covered over with wood, as is the rest of the country."

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The mouth of the Wighcocomoco or Pocomoke then was, as it now is, south of what now is known as Watts' Island. Thence going north you pass Tangier Island, then (including Fishbone and Herne Islands) extending as far north as Fox's Island is now.

From the mouth of the Pocomoke River to Point Ployer at that time (1608) the coast (says Smith's History) was low broken Islands of marsh. And from Cedar Straits to Jane's Island such is now the character of the coast. There may then have been (in 1608) and for thirty years thereafter, an

*This of itself fixes the identity of the Pocomoke and Wighcocomoco. Russel's, now Tangier Isles, are west and north of the mouth of Pocomoke River; were so located on Smith's map; hence he passed them going north up Tangier Sound.

unbroken neck of land, as we have supposed, flanked on the east and west by low broken islands of marsh, which have long since been washed away; some of them have become submerged within the memory of living witnesses. Smith's map indicates many islands in that vicinity which no longer are seen. The distance of ten or twelve miles from the mouth of the Pocomoke River north, would about reach the place indicated by the Jane's Island bar, as formerly occupied by Point Ployer. There is no tradition, so far as we can learn, of "a great pond of fresh water so exceeding hot," as is described by Dr. Russel. It was probably near the shore where they landed, and must have been occasioned by a subterranean boiling spring. Before the settlement of Europeans in that vicinity the point containing this great pond of hot fresh water was doubtless washed away, or probably some tradition of such a natural curiosity, in such a locality, would have been handed down from one generation to another. There is a place in the Sound, described as being not far from the end of the bar, north of the present Jane's Island Light House, called "Puppy Hole." Tradition says that at that place, for a space of a hundred yards around, the water was always in commotion, as if boiling up from the bottom, even in a perfect calm, and when other waters around it were still, and that formerly there were no soundings. It is said that this spot was often visited by the British officers during their occupation of Tangier Island in the war of 1812, and that on one occasion they ran out rattline enough to fill a hogshead without finding bottom. The map of the United States Coast shows that near the northwest end of the bar there is a sounding at the depth of 14½ fathoms, with soundings rapidly shoaling on the south to 9, and on the east and west to 6 fathoms and less. But the locality of Point Ployer is shown further by the mention in the account of Smith's second expedition, of Watkins', Read's and Momford's points; being on each side of Limbo. Smith's map shows the location of each of those places; the Straits of Limbo, (now Hooper's Straits,) with Momford's

Point to the north of them, and Watkins' and Read's points to the south, on the Pocomoke River. After the above description of Point Ployer by Dr. Russel, his account proceeds: "Being thus refreshed in crossing over from the main to other Isles," they were in great danger of being lost in a terrible storm. They were forced by ill weather to remain two days on these uninhabited Islands, which they called Limbo. Thence sailing for the main, they fell in with the river Cuscarawaock, (the Nanticoke,) thence they "passed by the Straits of Limbo for the Western Shore." The Isles they called Limbo were evidently those now known as Smith's Islands and Holland's Islands. And the only point of "high land upon the main," from Russel's (Tangier) Isles to Nanticoke River, was that since known as Jane's Island, which must have been the Point Ployer of Smith's History.

It was therefore a mistake to suppose that that Point ever was any part of the Watkins' Point of Lord Baltimore's Charter.

Another mistake was the course of the line; a mistake which was not discovered until 1858, when the line was traced by Michler. Instead of finding it an east line, as called for in the agreement, he found it 5° 15″ north of east. This error Michler supposes was occasioned by running the line by compass, without allowing for the variation of the needle, which he found to have been about 5° 15″ in 1668.

The mistake in running the line from the Pocomoke River to the ocean, without allowing for the variation of the needle, gave Virginia twenty-three square miles (14,720 acres) of Maryland territory in the northern part of Accomack County.

But the agreement, whatever may be its true construction, was acquiesced in by Charles II. and Lord Baltimore, who were the principals in the controversy. We have shown the practical construction of the agreement by Lord Baltimore in continuing to hold and grant all the lands north and west of the Pocomoke River and Sound and Cedar Straits. In the absence of any evidence to the contrary, we submit that

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Charles II. and his Governor and Council of Virginia acquiesced in that construction; and if that construction was not the true one, Col. Scarborough at least would have been found remonstrating against it. Doubtless Scarborough was entirely satisfied with the result of his negotiation. Lord Baltimore had been required to abandon the valuable and extensive territory between Onancock River and the divisional line, which Scarborough so carefully designated by "marked trees" and other "apparent marks and boundaries." There were many weighty reasons constraining Lord Baltimore to adjust this controversy upon the best attainable terms. His Charter had narrowly escaped the ordeal of the Parliamentary and Cromwellian revolutions. And he was well aware of other controversies threatening still more important portions of his territory. It was necessary to conciliate the Virginians and to end the controversy with the agents of his sovereign. He was well aware that Charles II., whilst in exile, in the year after his father's death on the scaffold, had granted the "Northern Neck" to Lord Hopton and others, as stated in Col. McDonald's report, including "The Rivers Potomac and Rappahanock, and all the Islands within their banks;" and that after his restoration to the throne, in a letter dated in 1663, just at the time when Scarborough raised the question as to the true location of Watkins' Point, the king had referred to his grant to Lord Hopton as embracing all the land lying between the rivers Potomac and Rappahannock and Chesapeake Bay, together with the rivers themselves and all the Islands within the banks of said rivers; thus coming in direct conflict with the Charter of Maryland upon the line of the Potomac. In addition to this, Lord Baltimore well knew the immediate danger threatening his territory on the Delaware Bay. Charles II. had in 1664 granted a patent to his brother James, Duke of York, for sundry tracts of land in America, including all the land from the west side of Connecticut River to the east side of Delaware Bay, and had sent naval and land forces, whereby the Swedes and Dutch were compelled to submit to

his Majesty, and the Delaware territory was placed under the rule of the Duke of York. Thus it remained in 1663, when Scarborough and Calvert met to determine "the place that should be accounted" Watkins' Point.

In this situation, Lord Baltimore was compelled to yield to Scarborough's demands. This he did probably also in the hope thereby to strengthen his position in regard to the impending controversies as to the Delaware Territory and the Northern Neck. It was doubtless to this yielding of the territory in Accomack, between Onancock River and the divisional line, that Philip Calvert referred in his remarks to Wm. Penn, during the interview between the Lord Proprietary, Charles Calvert, and Penn, at West River, in December, 1683. Penn had, in 1681, obtained from Charles II. a charter for Pennsylvania. In 1682 he obtained a release from the Duke of York of his claim to Pennsylvania, and also grants of "the three lower counties of Delaware."

Thus fortified, and with a letter to Lord Baltimore from the king, Penn went to West River to adjust the boundaries of the two provinces. In his report of the interview to the Lords' Committee of Plantations he states: "The first thing I did was to present the king's letter, which consisted of two parts: one, that the Lord Baltimore had but two degrees; and the other, that beginning at Watkins' Point, he should admeasure his said degrees at 60 miles to a degree. This being read by him first privately, then publicly, he told me, the king was greatly mistaken, and that he would not leave his patent to follow the king's letter, nor could a letter void his patent; and by that he would stand. This was the substance of what he said from first to last, during the whole conference. To this I answered, the king might be misinformed, rather than mistaken, and that I was afraid the mistake would fall on his side, for though his patent begins at Watkins' Point and goes to the fortieth degree of north lat., yet it presumed that to lie in the 38°, else Virginia would be wronged, which should extend to that degree, &c.

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"To this, his uncle and Chancellor returned, that to convince me his father's grant was not by degrees, he had more of Virginia given him, but being planted, and the grant intending only land not planted, or possessed, but of savage nations, he left it out, that it might not forfeit the rest."

Penn certainly misunderstood Chancellor Calvert's remark. The only places ever claimed to have been settled by Virginians before the date of the charter, were Kent and Palmer's Islands; and they were not "left out," but were awarded to Lord Cecilius Calvert, as covered by his charter. Chancellor Calvert's allusion was doubtless to the fact that the charter of Maryland covered "more of Virginia" on the Eastern Shore in Accomack than Lord Baltimore then claimed, but being settled by Virginians in 1668, "he left it out" by the Calvert-Scarborough agreement. It is inferred from a letter from Col. Scarborough to the Governor of Maryland, relating to his intended expedition against the Assateague Indians, dated "From Onancock, August 28th, 1659," that he then resided or had his head-quarters at that place. And as before 1668 Virginia grants had been made far beyond the "divisional line" agreed upon, it is highly probable that the Virginians were in the actual occupancy of most of the lands between Onancock and the divisional line, when Calvert and Scarborough met. Penn was probably not aware of these circumstances, and hence did not comprehend the scope of the remark. There is no mention whatever of any line of latitude in the "agreement" of 1668, because there was none in the charter. The "divisional line" agreed upon from the Pocomoke to the ocean *happened* to be on or near the 38th degree, as then laid down upon the maps before and at that time; and perhaps from this coincidence arose the mistake of the king and William Penn. But that the southern end of Watkins' Point was understood to extend below the 38th parallel, and to be wholly included within the limits of Somerset County, as described in the Act of the Maryland Assembly of 1742, before cited, is clearly shown by an ancient

map found among the papers of Josiah Bayley, for many years Attorney General of Maryland, and for which we are indebted to his son, Dr. Bayley, of Cambridge, Md. The map is thus inscribed: "To the American Philosophical Society, this map of the peninsula between the Delaware and Chesapeake Bays, with the said Bays and Shores adjacent, drawn from the most accurate surveys, is inscribed by John Churchman." It is without date, but was made before 1776, because it has the name of "West New Jersey," and after 1742, because it has Worcester County delineated upon it as separated from Somerset by the Act of 1742. It is upon the largest scale of any ancient map we have seen, and altogether the most accurate. It is singularly erroneous in the location of Tangier and Watts' Islands. The 38th parallel of latitude on this map crosses the Chesapeake at the southern shore of the Potomac River, a little north of Smith's Point; crosses an Island we suppose to have been intended for Smith's Island; crosses a peninsula called Watkins' Point, near its southwestern end; crosses Pocomoke Bay and an Island in it at Ratcliffe Point; and crosses the peninsula to the ocean upon the divisional line, as located on this map, between Worcester and Accomack counties. Bozman says truly that Russell's Isles, on Smith's map, "were the largest cluster within the Bay." He remarks upon the "extraordinary circumstance that in the latest and best maps of Maryland and Virginia, at that day, (1811,) a disagreement occurs in the denomination given to these lowest Islands. In Griffith's map of Maryland, published in 1794, they are called Tangier Islands; but in that of Virginia, published by Bishop Madison in 1807, these same Islands are denominated Watts' Islands,"—and they are so called in the old Churchman map above mentioned.

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Lord Baltimore persistently refused to ascertain his northern bounds by measuring two degrees from any place. The controversy with Penn about the Delaware territory was referred by Charles II, to the Lords of the Committee of Trade and Plantations in 1683, but their report was not made un-

and Plantations in 1683 but their report was not made un-

til after the death of Charles and the accession of James the Second in 1685. The report recommended that the land between the Delaware and Chesapeake bays should be divided into two equal parts, by a line from the latitude of Cape Henlopen to the 40th degree of north latitude, (the south boundary of Pennsylvania by charter,) and that one-half thereof, lying towards the Bay of Delaware and the Eastern Sea, be adjudged to belong to his Majesty, (viz., to King James, who granted it to Wm. Penn, when Duke of York,) and that the other half remain to Lord Baltimore, as comprised in his charter." This division was by the King in Council ordered immediately to be carried into effect; (the order enuring to the benefit of Penn, as grantee of James the Second, whilst he was Duke of York;) and though delayed for many years by obstructions of Lord Baltimore, was finally by Queen Anne ratified and confirmed in all parts, and commanded to be put in execution without delay. Proud's History of Pennsylvania, vol. I, 293, &c.

By this order of the King in Council, then ratified and ordered to be carried into immediate execution by Queen Anne, it was proposed to deprive Lord Baltimore of more than one and a quarter millions of acres of his territory, upon the pretext afforded by two unfortunate Latin words in his charter, "hactenus inculta;" which though urged in vain against the charter by the Virginians in 1633, 1638, and during Cromwell's time, and by the Dutch Ambassadors in 1659, were finally made available to accomplish this momentous result, under the potent influence of Wm. Penn. But the order still remained unexecuted. Perhaps the mode of enforcing its execution, consistently with the principles of Magna Charta and English law, was not free from doubt. And though Lord Baltimore's right to the 40° of north latitude was expressly recognized by the report of the Committee of Plantations, and by its confirmation by the King in Council, Penn persisted in his efforts to extend his southern bounds to the head of the Chesapeake Bay. He procured a

writ of quo warranto to be issued against Lord Baltimore's charter, thus threatening it with total destruction. But the revolution of 1688, and other revolutions and troubles, so affected both proprietaries and their provinces, that the controversy lingered till the death of Penn in 1718; was revived by his sons and devisees, who, in May, 1732, obtained from Lord Baltimore a written agreement, whereby he conceded to the Penns the Delaware territory; and that the southern boundary of Pennsylvania should begin at a latitude fifteen miles south of the most southerly part of Philadelphia, and run due west to the western extremity of the two provinces. The agreement was finally enforced by a decree for specific performance, passed in 1750, which formed the basis of another agreement between the two surviving Penns and Lord Frederick Baltimore in 1760. The result was the completion of the existing lines between Delaware and Maryland and Pennsylvania and Maryland in 1768.

We submit that this historical summary, the facts of which are unquestionable, clearly show that the location of the Pennsylvania line 15 miles below the 40° of latitude, or at 39° 43′ 18″ north of the Equator, was not the result of a line run or measured north two degrees, at sixty miles to a degree, from Watkins' Point on the 38th parallel of latitude, as stated by Col. McDonald in his report. And we further submit that the 38th parallel, either as erroneously located in former times, or as correctly located on the map of Chesapeake Bay made by the U. S. Coast Survey, has no connection whatever with the question of the true location of Watkins' Point, as called for in the charter, or of the Calvert-Scarborough line.

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The Western Boundary of Maryland.

The boundary line between Maryland and Pennsylvania extended west to the true meridian of the first source of the river Potomac. Whether this first source was at the north or south branch was a subject of controversy between the Proprietary of Maryland and the claimants of the Northern

Neck down to the Revolution of 1776, and between the States of Maryland and Virginia from that time down to the year 1852, if indeed it does not still remain unsettled.*

During the controversy, actual surveys proved that the source, or first fountain, of the south branch was the most western, by at least three miles, and the Proprietary of Maryland and the State of Maryland had persistently claimed to the first fountain of that branch. It may be true that Lord Baltimore's Charter did not confine him expressly to follow the true meridian to that first fountain. And if this be admitted, we submit that the result would have been to give to Lord Baltimore his election between following the meridian due south to the first fountain, and selecting the most advantageous line in a southeasterly direction to the further, that is, the southern bank of the stream which flowed fromt he first fountain. Sir George Calvert was well aware that in construing grants from the sovereign, the rule of the common law, that the grant shall be construed most strongly against the grantor, is reversed, from considerations of public policy. And therefore in preparing his charter, he provided against the operation of this rule of construction, by the 22d section of the charter, as follows, viz: "And if, peradventure hereafter it may happen that any doubt or question should arise concerning the true sense and meaning of any word, clause or sentence contained in this our present charter, we will charge, and command, *that* interpretation to be applied, always, and in all things and in all our courts and jurisdictions, whatsoever to obtain, which shall be judged to be the more beneficial, profitable, and favorable, to the aforesaid Baron of Baltimore, his heirs and assigns."

McMahon's History of Maryland, p. 50, states the grant to Lord Hopton and others to have been of "all that tract of land lying and being in America, and bounded within the heads of the rivers Rappahannock and Quirrough or Po-

*See report of Maryland Commissioners on this subject to Governor Whyte, Dec. 30th, 1873.—*I. D. J.*

tomac, (the courses of the said rivers as they are commonly called and known by the inhabitants,) and the Chesapeake Bay."

He says: "These grants of the Northern Neck, as it will be perceived, call for the lands lying on the south side of the Potomac to its head, and in this call there was nothing inconsistent or clashing with the call of the charter of Maryland," and "therefore a conflict between these two grants could only arise from the extrinsic difficulty or doubt as to the true location of the first fountain or head." On page 69 McMahon says: "As to the *chartered* extent of Maryland there can be little room for doubt. '*The first fountain of the Potomac,*' is evidently a descriptive term, intended to designate the most westerly source, and applies to the south branch, the source of which lies considerably west of that of the north branch. The extent of territory lying between the two branches is estimated at *half a million of acres*, including some of the most fertile lands of Virginia."

In 1776 Fairfax was proprietor of the Northern Neck to the extent of the ownership of the land, but subject to the jurisdiction of the Royal Government of Virginia. By the Constitution of Virginia of 1776, the commonwealth succeeded to all the rights of sovereignty belonging to an independent nation. That Constitution declared that "The territories contained within the charters erecting the Colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of these Colonies, respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomaque and Pocomoke, with the property of the Virginia shores and strands, bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

"The western and northern extent of Virginia shall in

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all other respects stand as fixed by the charter of King James I, in the year 1609, and by the public treaty of peace between the Courts of Britain and France in the year 1763, unless by act of this Legislature one or more governments be established westward of the Alleghany Mountains."

The State of Maryland had succeeded to all the rights of Lord Baltimore's charter, but the Act of quit claim of Virginia still left open the question as to the extent of the territory contained within the charter. The controversy from the beginning seems to have been confined to the question, whether the Maryland charter extended to the north or to the south branch of the Potomac River. Repeated efforts to settle it by Commissioners appointed by the respective States failed. At length, Maryland, by the Act of 1852, proposed to adjust and mark the western boundary line, "beginning therefor at the Fairfax stone." This offer was accepted by the Act of Virginia of March, 1858, and by the Act of Maryland of March, 1860, the line "as surveyed in the year 1859 by the Commissioners appointed by the States of Maryland and Virginia," was established as "the northwestern line of the State." Thus ended a controversy of more than a century's duration.* And the results of losses to Maryland of territory once clearly included within the limits of her charter may be estimated thus: To Delaware, one and a quarter millions of acres; to Pennsylvania, two and a half millions, and to Virginia a half million of acres, making a total of four and a quarter millions of acres of land, in addition to about 150,000 acres "left out" between the Onancock River and the Scarborough line, on the Eastern Shore.

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*This statement was made under the impression that Virginia had, in 1860, ratified and confirmed this westerly line as run and marked by the Commissioners, McDonald and Lee. It has since been ascertained that no such ratification was ever made. By the subsequent division of the State into Virginia and West Virginia, the settlement was devolved upon West Virginia; and it remains to be finally adjusted between West Virginia and Maryland, as set forth in the final report of the Maryland Commissioners.—*I. D. Jones.*

The Southwestern Boundary Line of Maryland.

After the call to the true meridian of the first fountain of the river of Potomac, the charter says: "Thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack," (Bacon's translation;) "from thence tending towards the south unto the further bank of the aforesaid river, and following the west and south line thereof unto a certain place called Cinquack," (translation in "Relation of Maryland;") "and from thence stretching towards the south unto the furthest bank of said river, and following the west and south side thereof unto a certain place called Cinquack," (Ogilby's America;) "then tending downwards, towards the south, to the farther bank of the said river, and following it to where it faces the western and southern coast as far as to a certain place called Cinquack, situate near the mouth of the said river, where it discharges itself into the forenamed bay of Chesapeake." (Thos. Edlyne Tomlins.)

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At the time of Lord Baltimore's Charter, the Potomac River had been explored only to the falls, and up the Quirrough, which was supposed to head further west than the main river, and both were supposed to head east of the Blue Ridge. In this uncertainty, and with the aid only of Smith's map, the descriptions of the head springs, and course of the rivers, were necessarily conjectural, and therefore vague. Like the other great rivers flowing into the bay on its western Shore, its general course was supposed to be southeast. In describing the western line from Delaware Bay, the charter had the words "*transeundo* recta linea per gradum predictum usque ad verum meridianum,"—going by a right line on the degree aforesaid as far as to the true meridian, &c. But after arriving at the true meridian of the first source of the river, another word is used to indicate the course, viz., "deinde *vergendo* versus meridiem,"—thence tending, (or the old word, trending, of the same import,)

towards the south; "ad ulteriorem dicti fluminis ripam," —to the farther bank of the said river; "et eam sequendo," —and following it (the bank) "qua plaga occidentalis et meridionalis spectat,"—where the western and southern coast, or shore, *looks*; (meaning, where the *right* bank faces or looks, as contradistinguished from the *left* bank, which is the eastern and northern. Mr. Tomlins is certainly in error in translating the words "qua plaga occidentalis et meridionalis spectat,"—"to where *it* faces the western and southern coast." To what does "*it*" refer? Certainly not to the preceding "*it*," for that referred to "eam" ("ripam" understood.) It certainly does not refer to "river," for then the Latin would have been "id" referring to flumen. "Plaga," shore or coast, is substituted for "ripa," "bank." Mr. Tomlins makes the coast to "face" itself. But it is submitted, with deference to Mr. Tomlins, a London "Attorney at Law and Record Solicitor," that "plaga," the coast or shore, is personified, and represented as looking at the river and following the flowing stream with its gaze.

In 1829, Chancellor Bland, of Maryland, in deciding upon a claim to certain water rights on the Potomac River, and remarking upon the jurisdiction of Maryland over that river, said: "The boundary called for in the charter of Maryland is from 'the first fountain of the river Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called *Cinquack*, situate near the mouth of the said river,' &c. To the full extent of this call for the right bank of the Potomac, Maryland has always held; and under that holding all the Islands in the river have been granted by patent from the land office, or legislative enactments, or titles derived from this State."

"Before the revolution, Maryland granted lands between the north and south branches of the Potomac." Binney's case, 2 Bland's Chancery Reports, 127.

The Virginia Constitution of 1776 and the Compact of

1755, certainly modified to some extent the charter limits of Maryland. There were a few maps after 1750 which indicate the divisional line on the north shore of the Potomac to Point Lookout. These were probably so made in the interest of the Fairfax claim, under the grant of Charles II. to Lord Hopton and others. The recital of the terms of this grant by McMahon and by Col. McDonald shows a material difference. McDonald says, "The express words were the rivers Potomac and Rappahannock, and all the Islands within their banks." If these were the terms of the grant, so far as they relate to the Potomac River and Islands, they were in direct conflict with the grant in the charter of Charles I. to Lord Baltimore, nearly twenty years before the grant to Hopton, and of course to that extent were merely void. One or two maps have been found which indicate the divisional line down the middle of the Potomac River and across the bay to the south of Watkins' Point and up the Potomac River. But the most authentic maps existing in 1776 indicated the line from Smith's Point direct to Watkins' Point. It is remarkable that in the Compact of 1785 provision is made for punishing offences committed "on that part of Pocomoke River, within the limits of Virginia, or where the line of division between the two States upon the *said river is doubtful*;" but no such provision is made in regard to the Potomac, a much wider river. The reason must have been, that Virginia had excepted from the limits of the Maryland charter, on the Potomac River, only "the Virginia shore and strand," which could only extend to low water mark, and to such improvements beyond that mark as Virginia might deem proper to authorize, leaving the residue of the river within Maryland jurisdiction for punishing offences committed upon it. This seems to be the legal effect, so far as regards the question "of jurisdiction." For all beneficial purposes, "the right of fishing in the river," &c., "the river shall be common and equally enjoyed by the citizens of both States." It is understood that the above is the construction acted upon by the judiciary of both States; and

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hence within a few years, a Virginia court declined to take jurisdiction of a homicide committed on a steamer lying at Acquia Creek, because the proof was, that the offence was committed on a part of the steamer which was below low water mark. The prisoner was sent to Maryland, tried, convicted and executed in Charles County, Maryland.

There seems to have been no difficulty originally in understanding the meaning of the charter. The line of boundary began at a point on the Chesapeake Bay; thence by a right line to the ocean; thence by and with the ocean and Delaware Bay to the 40th degree of latitude; thence west, by a straight line, to the meridian of the first source of the Potomac River; thence towards the south, (and a right line south answers that description,) to the farther bank of the river; thence following the bank and the western and southern shore of the river down to Cinquack, near the mouth of the river; and thence by the shortest line to the beginning. There never was any doubt where Cinquack was. It is plainly marked on Smith's map and Lord Baltimore's map, and all the ancient maps, and was rightly described in the Virginia proclamation of 1638, as being at the Great Wicomoco River, and the starting place of the last line of the charter.

That the southwestern shore of the Potomac was, down to 1776, understood by the Virginians to be the boundary line of the Maryland charter, is, we submit, implied by the terms used and already cited from the Virginian Constitution of that date. The territory contained within the charter is ceded to Maryland, with all rights which might at any time have been claimed by Virginia, *except the free* navigation and use of the Potomac and Pocomoke rivers, with the property of the *Virginia shores and strands bordering on either of* said rivers, and all improvements which had been or shall be made thereon. And we think it is still more clearly implied by the Compact of 1785, re-enacted in the Virginia Code of 1849 and 1860, under the title "Compact and Boun-

dary between Virginia and Maryland." The tenth section declares "that crimes and offences committed in that part of Chesapeake Bay which lies within the limits of Virginia, or that part of the bay where the line of division from the south point of Potomac River, (now called Smith's Point,) to Watkins' Point, near the mouth of Pocomoke River, may be doubtful, and on that part of Pocomoke River within the limits of Virginia, or where the line of division may be doubtful," &c.

This Article assumes as a fixed fact that the line of division runs from the south point of Potomac River, now called Smith's Point, to Watkins' Point, near the mouth of the Pocomoke River. And by this Compact, Maryland gave up her charter claim to follow the bay shore from Smith's Point down to the place formerly known as Cinquack, at the mouth of Great Wicomico River, distant about six miles south from Smith's Point.

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And again this fixed fact is assumed by the action of both States in authorizing the joint commission of 1858. The Virginia Act of March 26th, 1858, recites that,

"Whereas, the General Assembly of Maryland has passed two Acts for running and marking the boundary line between that State and the State of Virginia, beginning therefor at Smith's Point, at the mouth of the Potomac River, and running thence to the Atlantic Ocean, to form the eastern line; beginning at the Fairfax Stone, on the Potomac River, sometimes called the North Branch of the Potomac River, at or near its source, and running thence due north to the line of the State of Pennsylvania, for forming the western boundary line; and whereas, the Legislature of the State of Maryland has requested the appointment of a Commissioner on the part of this State, to act in concert with the Commissioner of Maryland, to run, ascertain and mark the said lines; therefore,

"1. Be it enacted by the General Assembly of Virginia that the Governor be, and he is hereby authorized and re-

quired to appoint, as soon as may be, a Commissioner, who together with a Commissioner who may be appointed on the part of Maryland, shall cause the said lines to be accurately surveyed, traced and marked with suitable monuments, from Smith's Point at the mouth of the Potomac River to the Atlantic Ocean, and from Fairfax Stone situated as aforesaid, to the Pennsylvania line as aforesaid."

We think therefore that it ought to be considered settled beyond question, that the divisional line across the Chesapeake Bay is to be run from Smith's Point. There can be no doubt about the true location of Smith's Point. It is "the South Point of the Potomac River," upon an island at its mouth, which, by patent dated 18th March, 1650, was granted by Sir Wm. Berkley, Governor of Virginia, unto Samuel Smith, for 529 acres of land. It is described in the grant as abutting northerly upon the mouth of Potomac River; southerly upon Little Wickacomico Creek; easterly upon ye mayne bay, and westerly upon a branch that divides this land from a parcel of land commonly called the King's Neck." Of course, like all other points of land similarly situated, it has been washed away, and greatly changed, since 1765. Mr. De la Camp, who made the survey of Somers's Cove and the shore of Jane's Island, under the direction of Michler, in 1858, and again under the joint commission of 1867, stated in his report that he found all of them very much changed since 1858.

The map of the U. S. Coast Survey, showing the soundings in the vicinity of this Island may be considered as indicating with reasonable certainty where the land originally extended.

The Boundary Line Across the Chesapeake Bay.

The description of this line in the charter is brief, and free from doubt, viz: From Cinquack "by the shortest line to the aforesaid promontory or place called Watkins' Point."

The American Atlas, containing the most correct and authentic maps of the British Colonies down to 1776, has

"a map of the Middle British Colonies by Lewis Evans, of Philadelphia, corrected and improved by Thos. Jeffreys, Geographer to the king, and published in London, 15th June, 1775," which indicates the divisional line, between Virginia and Maryland, from Smith's Point, near Cinquack, a few degrees to the north of east, passing south of Watkins' Point, through Pocomoke Bay, and over the Peninsula to the Ocean. It contains also, "a map of the most inhabited part of Virginia, and the whole province of Maryland," &c., drawn by Joshua Fry and Peter Jefferson in 1775, and inscribed by Thos. Jeffreys, to the Earl of Halifax, and the other Hon. Commissioners for Trade and Plantations.—Watkins' Point is distinctly laid down on this map, and the division line across the peninsula, east to the ocean, is clearly marked below the 38° degree of latitude, and under it are these words: "this line was run 27 May, 1688." The line on the Potomac and across the Chesapeake Bay is not indicated on this map. Smith's Point is shown as an Island at the mouth of the Potomac and little Wicomico rivers, a very little south of Watkins' Point, on the Eastern Shore, as located on this map.

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In the rooms of the Maryland Historical Society is a "Map of Virginia, Maryland, Pennsylvania and East and West New Jersey, by John Thornton, at the Platt in the Minories, and by Will Fisher, at ye Postern Gate on Tower Hill, London;" supposed to have been published about the year 1700.* On this map the divisional line between Virginia and Maryland begins at Smith's Point, crosses the bay by a due east course, and crosses the peninsula to the ocean by a line indicated by a row of boundary trees on each side of it. The divisional line on this map leaves Smith's Island entirely in Maryland.

* By a label upon the map, it appears to have been "Presented to the Maryland Historical Society by Wm. Snowden, of Birmingham House, Anne Arundel County, Md., a descendant of Col. John Snowden, who first introduced Iron Smelting into Maryland." It is also stated, "There is reason to believe the map was published in 1692."

The Churchman peninsula map, before described, has no divisional line indicated across the bay. The Island on which is Smith's Point, is located about two miles south of the 38th parallel, as located on this map, and an east line from it crosses the lower end of an Island supposed to represent Smith's Island, and touches the southern end of Watkins' Point; and if extended would strike the east shore of Pocomoke Bay, about two miles south of the 38th parallel. The shortest line upon the map of the U. S. Coast Survey from Smith's Point, running east, about three degrees north, will strike the westernmost angle of Great Fox Island, near Cedar Straits; and the shortest line to the land north of Cedar Straits and Pocomoke Sound will strike the westernmost angle of a tract of land called Plain Harbor, granted by the Proprietary of Maryland, on the 9th day of July, 1702, to Isaac Horsey and Nathan Horsey, for five hundred acres of land. The patent describes this land as lying and being in Somerset County, between the Sound and Pocomoke Bay and Cedar Straits, beginning at the mouth of a creek on Pocomoke Bay, on the westernmost side thereof, called Broad Creek; thence along the said bay, westerly, several courses and distances, to Cedar Straits; thence along therewith north 16¼ degrees westerly, taking in Cedar Hammock, 118 perches to the sound or bay side; thence along the sound northwesterly north, &c., &c., to the beginning.

This patent of Plain Harbor completes the chain of Maryland grants, extending from Tangier Sound, by Cedar Straits, to Pocomoke Bay and up the northeastern shore of the bay and river, to the land west of the beginning of the Calvert-Scarborough line at the marked trees on the east side of the river—covering all the land south of the prolongation westward of that line to the sound at Jane's Island.

It is admitted, that no grant from Maryland has been found for the land south of Cedar Straits, but that since they were formed, and after the neck of land which formerly extended southward from Annamessex marsh to the north

side of the mouth of Pocomoke Bay, at Watts' Island, had been broken into Fox's and Watts' Islands, those Islands appear to have been granted by Virginia, and to have been since held and are now held under Virginia titles; and have, ever since the date of the grants of Fox's Island, in 1699, and of Watts' Island, in 1702, been under the jurisdiction and government of Virginia, as part of Accomac County, as fully and as exclusively as the lands upon the north side of Cedar Straits and Pocomoke Bay, as before described, have been owned, held and governed under Maryland grants, as part of Somerset County.

The records of these grants by the respective States, and the certain holding in accordance with them, strongly corroborate our construction of the Calvert-Scarborough Agreement, and the tradition derived through old Mr. Tommy Nelson, that the divisional line between the two States crossed the north end of Fox's Island. That part of the Island where the line was said to cross, has doubtless long since been washed away, and is now covered by the waters of the Sound, and Cedar Straits. The tradition must have had its origin (after Smith's Point had been substituted for Cinquack, as the starting point towards the Eastern Shore,) in the fact, that the northwestern angle of Fox's Island was the point which would be reached by the shortest line from Smith's Point; for there is no record that any line was ever run across the bay, or any means adopted by the two States, to fix a boundary at the termination of the line on the Eastern Shore. After the agreement of Calvert and Scarborough, that the North Point formed at the mouth of Pocomoke River, by the Bay, should no longer "be accounted" the Watkins' Point of the charter, as claimed by Lord Baltimore, but that the parcel of land as described in their agreement, should be so "accounted," it became inevitable that the line across the Bay, from Smith's Point, should strike the angle of that Watkins' Point nearest to Smith's Point. And that angle is at Cedar Straits.

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Smith's Island.

A right line from Smith's Point to Cedar Straits, as these places are located on the map of the U. S. Coast Survey, leaves all of Smith's Island as located on that map, within the limits of Maryland.

The Churchman map, and most of the maps we have examined, which were made before the U. S. Coast Survey, locate Smith's Island further south than its true position, as ascertained by the Coast Surveys. The experimental line run by the direction of the Joint Commissioners in 1858, in its prolongation westward from Pocomoke River, was upon the theory, that thereby, "the westernmost" angle of Watkins' Point, as described in the Calvert-Scarborough report, might be ascertained. Michler states that, drawing the line from "Smith's Point,"—"across Smith's Islands *at* or *near the point where the said line is said to pass, it will be seen*, that it intersects the prolongation of the Scarborough line, very near the anchorage of the Light Ship, and where formerly existed the shore line." He states that the southern extremities of Smith's Island have always been acknowledged to be within the jurisdiction of Virginia, and that with the exception of four or five acres of firm ground, mere sites for rude fishermen's huts; the other portions of these Islands, *south of what is considered the boundary line from Smith's Point to Watkins' Point*, across the Chesapeake Bay consist of salt marshes.

We have already given our view of the Calvert-Scarborough line, and of the charter line, across the bay to Cedar Straits. We think it highly probable that the idea that any part of Smith's Island was within Virginia territory, had its origin in the dispute over the true location of Watkins' Point, which commenced in 1663. The Virginia Records show that Henry Smith, then of Accomack County, on a warrant for lands, due him from Virginia, took up a tract of land on Smith's Island, for which he obtained a grant from Gov. Berkley of Virginia, dated 6th October, 1667.

This grant is recited in a deed in the land records of Somerset County, Maryland, as follows, to wit: "Doth grant unto the said Henry Smith, one thousand acres of land, situate in Accomack County, being part of an Island beginning where the east and west line from Smith's Island, doth intersect, and bound on the northern part therewith; running southerly, to the farthest extent of the said Island; bound on the eastern and western sides by parts of Chesapeake Bay, and sunken marshes."

The description of this beginning is so indefinite and vague, that we suppose it would be impossible to locate the tract of land. This grant bears date the year before the Calvert-Scarborough Agreement. The authority and power of Calvert and Scarborough were limited to the single duty "of meeting upon the place called Watkins' Point," "and thence to run the divisional line to the Ocean Sea." They had no authority to establish a line across the Bay, or across Smith's Island, and they made no attempt to do so. We have found no record that any divisional line was ever run across Smith's Island, under the joint authority of the two Colonies or States; or that any such line was ever authorized to be run, or was run, by the direction of either Virginia or Maryland. Mere recitals in land grants to private individuals, by either of the Provinces or States, or calls in such grants, for a divisional line between States, afford no evidence to prove the existence or location of such divisional line. Divisional lines between States can be established only by treaty, compact or some public charter, or record of a public act, establishing such line by competent authority — Maryland and Virginia grants, subsequent to 1668, of land between Pocomoke River and the Ocean, call for the divisional line between those two colonies. But it is the line marked and established by the Calvert and Scarborough compact, of which there is record evidence, showing when and by what authority and by whom it was run and established. But there is no evidence of any such line across Smith's Island,

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And notwithstanding the numerous depositions taken by the present Joint Commission in relation to several divisional lines, stones and boundaries, upon Smith's Island, we confidently adhere to the statement contained in our report upon this subject to the Maryland General Assembly in 1868, that "there is no *certain tradition*, so far as the Commissioners could ascertain, to fix the location of any divisional line between Maryland and Virginia across Smith's Island." The testimony upon the subject was uncertain and conflicting. Besides the aforesaid grant to Henry Smith, there is on record among the Virginia land patents a grant, dated 23d October, 1703, to Francis McKemmy, Arcadia Welbourne, Daniel of St. Thomas Jenifer and John West, of a tract or tracts of "marsh and woodlands, it being contained on six Islands, beginning at a marked lightwood stump, standing near Nanticoke Sound; thence by marked trees, and over marshes and guts, *west* 1020 *poles*, to the main bay of Chesapeake, bounded on the west therewith; on the south by old Herne Island Straits, and on the east by Nanticoke Sound; and within this bound is contained 3170 acres."

The running of this west line across the north end of Smith's Island in 1703, doubtless gave origin to the tradition testified to by Severn Bradshaw and others. This grant must have been obtained in ignorance of Henry Smith's grant from Virginia of 1000 acres, and other previous grants from Maryland covering all the lands and waters within the limits of Smith's Island; and on finding out the mistake, the grant must have been abandoned, as we have found no evidence of any land on Smith's Island ever having been held or claimed under it. The first Maryland grant on Smith's Island is that part of the Island called "Cadger's Island," 200 acres, granted to Robert Cadger, 23d September, 1665, described as situated on the eastern shore standing in the bay, and calls to run along a marsh belonging to Annamessex Bay, by a line drawn south to the strait's mouth, standing against Pocomoke River. This description is evidently widely erroneous. A deed for part of this

Island in 1746, describes it as lying south of Cadger Straits, which are north of Smith's Island. The grant of Jones' Island "to Leonard Jones, 10th June, 1671, near Cadger Island, 100 acres, and other grants, from Lord Baltimore, cover all the land north of the Thoroughfare, comprising about one-third of the entire Island.

The next grant is of 1000 acres surveyed for Col. William Stevens, 7th June, 1679, assigned to Henry Smith, and patented to him 2d September, 1682, called Pitcraft, and described as "an Island of broken woodland and marshes" between Chesapeake Bay and an indraught of water called the Sound, beginning on the bay at a tree near the mouth of Smith's Thoroughfare; bounded thereby, easterly to the Sound, and by the side of the said Sound *to the division line* drawn between Maryland Virginia; thence west by said divisional line to the bay side, and by the bay to the beginning. This tract, called Pitcraft or sometimes "Pitchcraft," is bounded on three sides by water lines, the Thoroughfare, Sound and Bay. But there is no distance given to any one of its lines, and nothing whatever to indicate where the divisional line west to the bay side began or ended, except that it started from the Sound and extended west to the bay. Henry Smith removed from Accomac to Somerset County, Maryland, before 1693, and finding that Col. Stevens had, under a warrant from the Land Office of Maryland, surveyed and located a tract of land on Smith's Island, calling for a divisional line between Maryland and Virginia, he obtained an assignment of Stevens' equitable title and received a patent for Pitchcraft. If Virginia had title to the 1000 acres granted him in 1667, or any part of them, he thus became owner of all the Island south of Smith's Thoroughfare. His first sale and conveyance of part of these lands was to John Tyler, of 200 acres, by deed dated 8th August, 1693, which recites the grant by Sir Wm. Berkley of 1000 acres, lying in Virginia, and the survey of Pitcraft by Col. Stevens, the assignment to Smith, and the patent to him, for 1000 acres

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of land, from Lord Baltimore. The deed conveys to John Tyler a parcel of land of 200 acres, taken out of *the said* 2000 *acres* granted by said Sir Wm. Berkley and Lord Baltimore, "being part thereof in Virginia and part in Maryland," but there is nothing whatever in the description or calls to indicate what part was in Virginia or what in Maryland. The deed is of record among the land records of Somerset County.

Within the limits of this deed to John Tyler was included the only high land fit for habitation on the eastern side of the Island. At the time of the deed, 1693, there were probably five or six acres of this high land, which have been mostly washed away, leaving an extensive shoal and about two acres of high land. At this place John Tyler is supposed to have built his dwelling, and from time immemorial it has been known and called "Horse Hummock." The descendants of John Tyler continued to own it until 1842, when by deed dated October 2d, 1842, Wm. Tyler and wife conveyed to Peter Evans, "all that tract or parcel of land called "Horse Hummock," or by whatever name the same may be called, situate, lying, and being on Smith's Island in Somerset County, in the State of Maryland." Peter Evans removed to Accomack County, and by deed dated 3rd October, 1857, conveyed Horse Hummock, to John W. Marsh, describing it as being in Somerset County, and contained within metes and bounds; beginning at a well known bounder stone, lying at the Sound side, about three-fourths of a mile to the north of the house, and thence running a west course across the marshes to Tyler's Creek; thence southerly by the creek to a well known point, called Horse Hummock Point, and thence up the Sound side to the beginning. Marsh and wife, by deed of 30th January, 1866, conveyed the same land, by the same description, to Johnson Evans and John W. Evans; and John W. Evans and wife by deed of May 11th, 1872, conveyed their interest by the same metes and bounds, to Johnson Evans. All these

deeds are recorded in Somerset County, and the place and its occupants have always been under Maryland jurisdiction, as a part of Somerset County, as far as we have been able to ascertain. The stone mentioned in these deeds could never have marked the beginning of a divisional line across the Island, because thedeed to John Tyler calls for part in Maryland and part in Virginia, and all south of the divisional line would be in Virginia, if such divisional line existed.

But all question as to the jurisdiction of Horse Hummock ceases, as soon as it is settled that the line across the bay, starts from Smith's Point. According to the map of the U. S. Coast Survey, a right line to Jane's Island Light, (even if that point should be decided, to have been the place where the westernmost angle was,) will leave Horse Hummock more than a mile in Maryland, and will leave only a narrow strip of marsh of Horse Hummock Point a small part of South Point marsh and Shank's Hummock, with its "four or five acres of firm ground," and its half dozen families within Virginia. And we think it cannot be questioned that a decision, fixing "the extremest part of the westernmost angle of said Watkin's Point," at the southwestern end of Jane's Island bar, and that the divisional line should run thence by right line to the ocean, would involve a correction of the mistake, or "undue proceeding" in running the line in 1668, 5° 15″ north of east, instead of allowing for that variation of the needle so as to "run an east line," which this report avers that they did and which the charter required. We are informed that the Act of the Virginia Assembly in force in 1668, required surveyors in running lines to allow five degrees for variation of the needle. If this be so, Col. Scarborough, an intelligent Virginian and Surveyor General of Virginia, under "his Royal Majesty's Commission," would be presumed to be aware of it. And if he knowingly caused or permitted the divisional line to be run without such allowance, it was, (to use the phrase of Gov. Calvert, on a former occasion) an "undue proceeding." In either case Equity would rectify the error.

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The result would be a due east line, running south of the Light House, in Little Annamessex River, crossing Ape's Hole Creek, a short distance north of its mouth, and striking Pocomoke Bay, a short distance beyond Ape's Hole Creek, thence across Accomack County, south of Pitt's Wharf, and New Church, and within a quarter of a mile of Horntown, and including in Maryland nearly all of Chincoteague Bay. This line would deprive Maryland of a small part of her territory, and some valuable citizens in Little Annamessex Neck, who on becoming citizens of Virginia would have opened to them the oyster grounds, not only of Pocomoke Bay, but of all other Virginia waters accessible to citizens of Accomack County. It would restore to Worcester County, the twenty-three square miles, equal to fourteen thousand, seven hundred and twenty acres of land, now included in Accomack County, in consequence of that error.

But it is believed that such result is not desired by either side. It is natural that the residents in the vicinity of the line should prefer to remain, as far as practicable, under *the jurisdiction to which they have been accustomed. To effect this, a just and equitable compromise* line ought to be adopted.

It is eminently a fit case for the adoption of a just and equitable compromise line. We have entered into a somewhat elaborate examination of the probable original location of the Watkins' Point, of the charter. We have shown the large concession of Maryland territory by the Agreement of 1668. That concession was perhaps inevitable, as there was no tribunal in that day to which Lord Baltimore could have resorted with hope of fairness and justice.

The re-tracing in 1858 of the line of 1668, disclosed, that by an error in the original running of that line, nearly fifteen thousand acres of land were improperly taken from Worcester County and included in the county of Accomack. It has been shown that in the Compact of 1785, Maryland yielded the line from Cinquack and accepted Smith's Point

(five or six miles further north) as the starting point of the line across the bay. And in the controversy over the half million of acres of land between the north and south branches of the Potomac, she yielded a claim which, in the judgment of some of her most eminent lawyers, was unquestionably legal and just. It is remarkable, too, that in the Compact of 1785, while conceding that the right of fishing in the Potomac River shall be common to, and equally enjoyed by, the citizens of both States, Maryland omitted to secure, by express terms, reciprocal rights in the Pocomoke River. It is but just to Virginia, however, to state that until recently her laws regulating the taking of oysters and terrapins in the rivers Pocomoke and Potomac, secured to the citizens of Maryland equal privileges with citizens of Virginia in that regard. We regret to be compelled to say, that the attempt of late years to exclude citizens of Maryland from equal privileges in taking oysters in Pocomoke Sound, is a departure from that reciprocity, in that regard, which had theretofore ever existed between these two States. We suppose that this departure originated in a misapprehension of the purpose of the preliminary survey, made by Michler under instructions of the Virginia and Maryland Commissioners, in 1858. Their Commission was to re-trace and mark the boundary "between Smith's Point, at the mouth of the Potomac, and the Atlantic." In the execution of this duty it became obvious that further legislation would be necessary before the line could be established.

Col. Lee reported that they "concluded to obtain, in addition to the evidence already at hand, the best local information, by an actual survey of the vicinity of the boundary, and to lay the whole before their respective legislatures, for their action thereon." But the legislation of Virginia seems to have proceeded upon the mistaken idea that the preliminary survey established a divisional line—whereas, the survey revealed, for the first time, a serious error, in running the line on which were "marked certain trees and other apparent marks and boundaries;" while the residue of the line

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was left in obscurity and uncertainty. Col. Lee accounted for this, with much force in his report, in the statement that "until recently all existing maps of Maryland and Virginia erroneously placed the north shore of Pocomoke Bay so much too far north as in some degree to conceal the want of conformity with the provisions of the charter, as upon these maps the present boundary between Worcester, Maryland, and Accomack, Virginia, if produced westwardly from Pocomoke River to the Chesapeake Bay, would pass, for almost the whole distance, over the northern portion of Pocomoke Bay."

The present Joint Commission is empowered to adjust and settle this disputed line, subject to confirmation or rejection by the respective States. And in view of the whole case, the Maryland Commissioners respectfully submit to the Virginia Commissioners the following line to be established by compact, between the two States, as the divisional line between them, that is to say:

Beginning at low water mark at the divisional line between the States of West Virginia and Virginia, upon the southwest coast or shore of the Potomac River; thence following the said river, at said low water mark, to all wharves and other improvements now extending, or which may hereafter be extended by authority of Virginia, from the Virginia shore into the said river beyond low water mark; and following the said river around said wharves and other improvements, to low water mark on the southeastern side thereof, and following the said river, in the same manner, down to the easternmost angle of Smith's Point, at the mouth of the said river Potomac, where it flows into the Chesapeake Bay; thence by a right line to the centre of Cedar Straits, upon Tangier Sound, near the southeastern end of Watkins' Point; thence by a right line, in a southeasterly direction, to the channel of Pocomoke Bay, or river, nearest to Cedar Straits; thence up, by and with the said channel of said bay and river, to a point therein op-

posite to the place on the east shore of the said river, ascertained by Mr. De la Camp, in 1867, as the beginning on said shore of the divisional line run and marked by Calvert and Scarborough in 1668; and thence by and with said divisional line, as surveyed and laid down on the map made by said De la Camp for the Joint Commissioners of Maryland and Virginia, in 1868, to the Atlantic Ocean. The right of fishing and taking oysters in Pocomoke Bay and River to be common to the citizens of both States, subject to concurrent regulations by the two States, as provided by the Compact of 1785, in regard to the right of fishing in the Potomac River.

ISAAC D. JONES,
LEVIN L. WATERS,
WM. J. AYDELOTT.

NOTE.—Since the preparation of this Report, Mr. Jones has been favored by Chas. G. Nicholson, Esq., of Baltimore city, with a copy of "Griffith's Map of Maryland," mentioned in the notes to Bozman's Maryland, and which for several years he had sought in vain to find. It is thus described:

"Map of the State of Maryland, laid down from an actual survey of all the principal waters, public roads and divisions of the Counties therein; describing the situation of the Cities, Towns, Villages, Houses of Worship, and other public Buildings, Furnaces, Forges, Mills, and other remarkable Places; and of the Federal Territory; as also a sketch of the State of Delaware; shewing the probable connexion of the Chesapeake and Delaware Bays; by Dennis Griffith, June 20, 1794. Engraved by J. Thackara and J. Vallance. The Scale of Miles 69 9-10 to a degree. Phila. published, June 6, 1795, by J. Vallance, Engraver, No. 148 Spruce street.

"To the Governor, the Senate, and House of Representatives of the State of Maryland, this Map is respectfully inscribed by the Author."

On this map, Watkins' Point is marked on the land between Pocomoke Bay and a cove or branch of "Little Annemessex River," evidently what is now known as Somers' Cove.

The dividing line between Virginia and Maryland is not marked entirely across the Chesapeake Bay, but in the direction of a right line from Smith's Point, at the mouth of Potomac River, to the southernmost end of Watkins' Point, a marked line begins in the Chesapeake Bay, west of what is now known as Old Horse Island Straits, and passes through the said Straits in a N. N. E. direction to the southern end of Watkins' Point as located on this map; passes around the slight curve of Watkins' Point at Cedar Straits to the 38th parallel of N. latitude as laid down on this map; and thence by a marked line, due east, on the said parallel to the Atlantic Ocean. On this map, Tangier Islands are described as a group of five Islands; and the said marked line passes through the Straits nearly midway between Smith's Island on the north and the most northern of the Tangier group, doubtless that which in modern times has been known as old Herron, or Herne, Islands. The said 38th parallel cuts the south end of Smith's Island, but the marked line is at least a mile south of the southern end of Smith's Island. The marked line across Pocomoke Bay strikes the east shore of said bay at a point called "Hatchet," and leaves two Islands in Pocomoke Bay, (not named,) in Mary-

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land. From the location, one of them is supposed to be Sykes' Island, which has always, (within the memory at least of the oldest now living inhabitants,) been claimed and occupied by Virginians. Jane's Island is located as the north headland of Little Annemessex River, and the "westernmost angle" of this Island is a narrow neck or tongue of land projecting into Tangier Sound. Watkins' Point, at Cedar Straits, as located on this map, is more western than "the westernmost angle" of Jane's Island. The line from Watkins' Point to the Atlantic Ocean, as well as the 38th parallel of N. latitude, are evidently located on this map too far south. But the line indicated from Smith's Point to Watkins' Point, at Cedar Straits, shows what was understood, eighty years ago, to be the southern boundary of Maryland across the Chesapeake Bay and Tangier Sound to Watkins' Point.

The foregoing Note was intended to be inserted at the end of the Report, dated Baltimore, December 20th, 1873. The map was not received until that Report was in print, and hence is appended to the "Maryland Statement."
—*I. D. Jones.*

Depositions of Witnesses.

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—*J. D. Jones.*

Depositions of Witnesses.

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The severall persons subscribed doe make Oath yt they have of long time past heard of and knowne ye River of Pokomoke, and yt ye said River hath bin so called tyme out of mind, both by ye Report of ye Indians and knowledge of ye Subscribers, and is to this day so called, being a River on ye Easterne Shore of Chesepiack Bay in Virginia lying to ye Southward of A small Spirall point on ye Southside of Anamessecks and yt point is to ye Southward of ye place described in Capt. Smith's Mapp for Watkins point so far as a man can see in a Cleere day, and yt said River of Pokomoke and so scituate as aforesaid is so called to this Day.

EDM. SCARBURGH,
WILL. JONES,
GEO. PARKER,
ANTO. HODGKINS,
JNO. RENNY,
JOHN WISE,
EDW. REVELL,
CHARLES SCARBURGH.

Sworne in Open Court ye 19th of July 1664.

Test— ROBT. HUTCHINSON, Cle. Cur.
Co. Accom'k.

The foregoing are correct copies from the Records of the Clerk's Office of the Court of the County of Accomack.

Test— M. OLDHAM DY:
for WM. H. B. CUSTIS, C. A. C.

1871, March 21st.

Statement of the Virginia Case.

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Statement of the Virginia Case.

A succinct statement, before the Joint Commission of the States of Maryland and Virginia, to settle and adjust their boundaries, made on the part of the Commissioners of Virginia, at Richmond, Va., November 7th, 1872, citing some of the main evidence, and reserving the right of adducing other evidence, if necessary, to support the claims of Virginia.

I.

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"By letters patent granted by Queen Elizabeth to Sir Walter Raleigh, which bear date March 26th, 1584, she gave to him, and to his heirs and assigns "free liberty to search for and find such *barbarous lands, not possessed by any Christian people*, as to him might seem good, and the same to occupy and enjoy forever." This grant was without any other definite limits." See Hakluyt, vol. 3d, p. 243; also Williamson's History of North Carolina, vol. 1, p. 219.

This first settlement made by the English in Virginia, and the first British settlement established anywhere on the Continent of North America, (see Hakluyt, vol 3, p. 243,) was abandoned by the founders A. D. 1590. See Smith's History of Va., vol. 1, p. 105.

Queen Elizabeth, 1584, named the whole country claimed by Great Britain, Virginia. See Hakluyt, vol. 3, p. 240.

That Queen died in 1603, and was succeeded by James I., and in the year 1606 he issued his letters patent to settle colonies in Virginia. The 1st patent bears date April 10th, 1606. By these he divided that portion of Virginia which

lies between 34° and 45° N. L., into two colonies and two districts of territory. In one of these, called the first or southern colony of Virginia, he authorized the London Company, Sir Thomas Gates and others, his associates, to plant a colony wherever they might choose, between 34° and 41° N. L., and he vested in them a right of property in the land, extending along the sea-coast fifty statute miles, on each side of the place of their first plantation, and reaching into the interior 100 statute miles from the sea-coast. The other of these colonial districts, called the second or northern colony of Virginia he allotted to the Plymouth Company, Thomas Hanham and others, his associates. These he authorized to plant a colony wherever they might choose, between 38° and 45° N. L., and he gave to them a territory of similar limits and extent to that given to the first colony. He provided, however, that whichever plantation of the said two colonies should be *last made, should not be within 100 miles of the other that might first be established.* These two colonies, at first called the London and Plymouth Companies, soon dropped their names, and the name of Virginia, which at first was applied to both of the colonies, was retained by the southern colony only, while the northern colony was called New England. See Charters, Stith's History of Va. Appendix No. 1.

The London Company commenced its settlement first.—On the 13th May, 1607, the adventurers of that company established their first habitation at the place named by them James City. See Smith's History of Virginia, Vol. 1, book 3, ch. 1, p. 149.

The first charter of April 10th, 1606, itself enables us to determine with great accuracy, the limits of the grant made by it to the London Company.

If a meridional line be drawn through James City, and extended each way to the distance of fifty statute miles from it; if parallels be drawn through the extremities of this meridian, and extended to the sea-coast; if 100 statute miles

from thence be laid off upon each of these parallels, and if a straight line be drawn from the extremity of one of them so determined, to the extremity of the other, the diagram so to be constructed may be considered as a parallelogram or square, the base of which will be 100 statute miles, and its area 1000 square miles. Such a diagram, so constructed, is in precise accordance with all the calls of this charter.

This charter was granted before the country to which it was designed to apply was discovered, and the territory could not reasonably be confined to such limits, owing to its many disconnected peninsulas. This was soon discovered by the explorations of Capt. John Smith in the year 1608. (See Smith's History of Virginia, vol. 1, book 3, ch. 5 and 6, and the map.) Accordingly the London Company applied to the King to alter this charter, and on the 23d May, 1609, he issued new letters patent, of that date, for this purpose,— The Plymouth Company had then made no settlement, so that the whole country granted *was as open to the new grant as it had been in* 1606.

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Before this second charter was granted to the London Co. the northern headland at the mouth of James River was discovered, and called by the name it still bears: Point Comfort. Taking this known and established position as a starting point, the new charter granted to the Company "all those lands, &c., situate, lying and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea-coast to the northward, 200 miles; and from the said Point or Cape Comfort, all along the sea-coast, to the southward, 200 miles; and all that space and circuit of land lying from the sea-coast of the precinct aforesaid, up into the land throughout from sea to sea, west and northwest; and also all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid." See Stith's History of Virginia, Appendix No. 2, p. 8, etc.

As one of the purposes of this second charter is declared

in it to be "to grant a further enlargement and explanation of the former grant" of 1606; and as no other change in the mode of determining the new and enlarged limits, from that required for determining the boundaries under the first charter, except that the precise point of Cape Comfort is substituted for James City, we are bound to adopt the same mode of determining the new limits, which had been adopted and approved in the former case.

Therefore if a meridional line be drawn through the Point of Cape Comfort, and extended each way to the distance of 200 miles from thence; if parallels be drawn through the extremities of this meridian, and extended from sea to sea (i. e. from the Atlantic to the South Sea or Pacific) the diagram so constructed may be considered a parallelogram. The base of this will be the sea-coast of the Atlantic, having a meridional length of 400 miles, bisected by the parallel of the point of Cape Comfort, and the altitude of this parallelogram will be the distance from sea to sea.

If we would know why the limits of the London Company was extended precisely 200 miles to the north of the parallel of the point of Cape Comfort, curiosity will be satisfied by taking the trouble to calculate the difference of latitude between that parallel and the more northern parallel of 40°. In making this calculation allowance must be made for the trifling error caused by the imperfection of the clumsy instruments used in 1609 for making observations of latitude, as well as for the erroneous opinion then entertained as to the length of a degree of a great circle in English statute miles. We know now the exact quantity of each of these errors in our case, but it must be recollected that one of them (the last) puzzled Sir Isaac Newton almost a century after 1609. But, correcting the calculation in this way, we will so discover that 200 English statute miles, measured along a meridian from the parallel of the point of Cape Comfort, will carry us to the parallel of 40° N. lat., which last parallel was then made the common boundary between the two

great districts of Virginia and New England. (The foregoing condensed statement is from Report No. 457, 28th Cong, 1st session, H. Reps., "Issue of scrip," etc., to accompany bill H. Reps., No. 353, made by Hon. E. W. Hubard, from the Committee on Public Lands; partly written by L. W. Tazewell, Esq., and partly by D. W. Leigh, Esq., and partly by Mr. Hubard—see his letter.)

This clear view of the grants and definite delineation of the territory granted, make manifest several cardinal points to be remembered throughout the discussion of the true boundaries of Virginia:

1st. The grants speak *by lines of Lat., by extent of measurement by miles*, and *not by natural objects*, such as places, rivers, &c., except as to the initial points of James City and Cape Comfort.

2d. They give no courses of lines except northward and southward from the initial point, and west and northwest from sea to sea, and this applies to the *territory* granted, and *not to the lines* by which it was bounded; for the first grant was made before the discovery of the territory, and the second enlarged merely the first.

3d. The first grant *overlapped the territories of the two Co.'s three degrees of latitude from* 33° *to* 40° *N. L.*, and the second made the 40th degree the southern limits of New England without granting to the London Co. *sole* right up to 40° N. L.

4th. The two lines of 38° and 40° N. L. thus became cardinal points of boundary, and must be observed: the first as the *northern limit of Virginia*, and the last as the extreme southern limit of New England.

5th. And these facts, and the 100 miles distance from one settlement to the other, enjoined by the charters, show the way the door was opened to the King for the Prerogative grant to Lord Baltimore.

6th. Smith's map laid down the line of 38° N. L. far

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south of where it is now known to be, but not far from Smith's Point; showing, as will hereafter appear, that the intent and meaning of the Grants by Charles I, on 20th June, 1632, to Cecilius Calvert, Baron of Baltimore in Ireland, was to bound Maryland on the western shore of the Chesapeake Bay by the river Potomac, and on the eastern shore of that bay by the parallel of 38° N. Lat. on the south; that degree of latitude being the extreme limit north to which the territory of the London Co. extended *originally in sole right*, and the space between 38° and 40° being comparatively unsettled, except by the Indians, owing to the clause which put the two companies 100 miles apart. And, as will appear hereafter, the Watkins' Point named in the charter to Lord Baltimore, as the initial point of bounds on the eastern shore, was then known to be under the line of 38° N. latitude. See "Considerations of Lord Baltimore's patent both in Law and Equity," and Calvert and Scarburgh's Report in 1668. And to prove that Lord Baltimore himself tacitly admitted that his extreme boundary south, on the eastern shore, was 38° N. latitude, see his own memoir of his conference with William Penn, in which Penn again and again so asserted to him, without contradiction by him, when he was claiming N. to 40° N. latitude.

But especially note No. 117 of the De Jarnette papers, August 16th, 1682, being the letter of the King reminding Lord Baltimore that he had but 2° N. latitude south of the 40° N. latitude.

Such were the original limits of the Colony of Virginia under the charters of the London Company and the grant to Lord Baltimore.

II.

The charters of the London Co. (there were three) were cancelled by a judgment of the Court of King's Bench, pronounced in a case of quo warranto depending in that Court at its Trinity term, in the year 1624. But this took away only the *monopoly of the Company* and the power of *its* gov-

ernment over the Colony, which were vested in the Company by the charter, *without affecting at all the territorial limits, or other rights of the Colony itself;* and the only change was from the Proprietary government of a trading Company to a royal government over the same dominion and colony. See Hubbard's Report and see Chalmers' Annals, page 63. The colonial legislature opposed the restoration of the charters to the Company in 1642; see I Hen. Stat. at Large, pp. 230, 236. See also answer of Gov. Sir Wm. Berkely, in 1671, to one of a series of statistical inquiries of the Commissioners for foreign plantations: "What are the bounds and contents of the land within your government?" 2 Ib., p. 514. See also the opinion of the Supreme Court United States in Johnson vs. McIntosh. Judge Marshall said: "This (the charter of Virginia of May, 1609,) was *annulled so far as respected the rights of the Company*, by the judgment of the Court of King's Bench on a writ of quo warranto, *but the whole effect allowed to this judgment was to re-vest in the Crown the powers of Government and the title to the lands within its limits.*" 8 Wheaton, 578. The privileges of free denizens, or persons native of England, and the titles of proprietors of lands in free and common socage, guaranteed by the charters, survived their revocation, and property in the territory survived to the grantees or patentees. See Hubard's Report, p. 20.

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The United States have recognized the right of Virginia to the lands included in the limits of these charters, and so has Maryland, by accepting the deeds of cession from Virginia of her northwestern territory, on the conditions imposed by herself, and the Constitution of the United States recognizes and ratifies the contract of this cession acknowledging title in Article 6, Clause 1.

Virginia does not claim her title under the charter. She claimed it as a self-created body politic and corporate, which in 1776 proclaimed itself a free, sovereign and independent State. Self-created and self-sustained, after 1776, she

claimed nothing *under these charters*, which were necessarily abrogated by the very fact of her independence. She refers to them, constantly, as she would do to any history, geographical treatise, or authentic map, as the best evidence the nature of the case permits, to prove what are the metes, bounds and extent of the territory which she claims. She refers to them as she does to the grants made to others—of Maryland to Baltimore, of North Carolina to Lord Clarendon and others, and of Pennsylvania to William Penn—as proofs of what were and are the limits of that region in America called Virginia. Virginia claims, by virtue of her declaration of sovereignty, made in June, 1776, the truth of which declaration, then made, was afterwards, in 1783, recognized by the King of Great Britain, the former sovereign of this region. See Hubard's Report.

Whilst a colony, in 1634, Virginia asserted her claim, under the charter, to the territory of Maryland, and the King in Council *did not decide against that claim*, but left her to her remedy at law. See the McDonald Papers, vol. 2—page 135, S. P. O. Col., vol. 6.

In all countries governed by the common law, precedent is of force to make law—constitutional as well as municipal law; in all civilised countries, without exception, prescription seems title. The precedent of the charter of Maryland, in effect, established the right of the Crown to dismember from Virginia any part of her territory, at its discretion, without her consent; but *it in no wise affected the right of Virginia to such territory within her ancient limits, as had not been dismembered from her.*

The charter was *annulled so far as respected the rights of the Company, not in respect to the rights of the Colony.*

The powers of government, the same powers which the charter had vested in the Company as proprietor, were revested in the Crown; the same title to the lands within its chartered limits, which the charter had vested in the Company, was revested in the Crown. The charter, so far from

being annihilated, was recognized. The vacant lands in the Colony were henceforth Crown lands in the King's dominion of Virginia, and the extent of that dominion was only to be ascertained by the territorial limits described in the charter. Those lands could only be acquired by grants from the Crown, according to a system of land laws enacted by the colonial legislature, and through the instrumentality of the colonial government. See Hubard's Report.

The argument drawn from the judgment against the London Co. in 1624, if of avail to prove that Virginia was not thenceforth entitled to claim under the charter of May, 1609, would prove too much. It would prove that she had no charter at all, for she never pretended to have any other: it would prove that Virginia, in her political capacity, had no title to any territory whatever; not only no title to the northwest of the Ohio, or west of the Alleghanies, but no title to the Island of James Town, or the City of Williamsburg, or Old Point Comfort. See Hubard's Report, part written by B. W. Leigh. But let her colonial existence and form of being be whatever it was, the Colony became a sovereign State in June, 1776, and thereby became sovereign over her ancient limits, and the right of eminent domain is independent of all colonial charters or Royal patents, and is as supreme as royalty itself.

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III.

On the 19th August, 1629, Lord Geo. Baltimore addressed to Charles I. a letter, now in the State paper office of Great Britain, endorsed "My Lord of Baltimore to ye K. ye 19th Aug: 1629," (see 2d vol. of the McDonald papers, p. 24,) complaining of his colony in New Foundland, proposing to remove himself "with some 40 persons to His Majesty's dominions in Virginia," and praying for a grant of "a precinct of land, with such privileges as the King, his father, was pleased to grant him in New Foundland."

The King replied by letter to Lord Baltimore, dated No-

vember 22d, 1629, S. P. O. Colonial, No. 38, vol. 5, (see the McDonald papers, vol. 2d, p. 9,) advising him to desist from further proceeding, and to return to his native countrie with his first conveniency, and promising him much favor.

The letter to the king was accompanied by several papers, the first of which is endorsed "demands with reasons for 9 degrees of Mr. Attorney Gen'l, 10th February, 1629."—(McDonald papers, vol. 2, p. p. 24 to 34, inclusive.

In October, 1629, Lord Geo. Baltimore went to James City (now James Town) in person. See last page of vol. 1st, Henning's Statutes at Large, as to the pilloring of Thom. Tindall for insulting and threatening Lord Baltimore, and the "letter from the Commissioners of Virginia to the Lords of the Privy Council," found in S. P. O. Colonial, No. 39, Great Britain, announcing Lord Baltimore's arrival in the colony in the beginning of October, 1629, from New Foundland, and that he was willing to reside with his whole family in Virginia, though his intention was to settle southward first. That they were willing to receive and entertain a person of his high rank. Thereupon they tendered the oaths of Supremacy and Allegiance to his Lordship and some of his followers, who making profession of the Romish religion utterly refused to take the same. That his Lordship then offered to take an oath, a copy of which was inclosed, but they strictly enacted the oath required by King James I. And they implored that no Papist should be suffered to settle their abode in the colony of James City. By the 1st charter of the colony, Papists were prohibited from settling in its limits. And the oaths of Supremacy and Allegiance which Lord Baltimore declined to take did drive him to settle north of 38° N. L., the extreme northern sole limit of the London Company by the orginal grant. As stated in the paper "Considerations of Lord Baltimore's Patent," &c., &c., already referred to, he went to Watkins' Point lying on the 38° N. L., on that line where the Western Shore boundary, the Potomac, mouthed, and which he represented

to be settled by savages, and to be vacant between the Plymouth and London Companies. See his own map (Herman's) and Bowen's map. See also McDonald Papers, vol. 6—38th instruction by the King, Charles II., to Lord Culpeper, p. 33 or 35 and p. 135-132.

See oaths of supremacy and allegiance charged—Id. vol. 7. p. p. 317 and 319. Alarm about war with France and Indians, and course towards Catholics, p. 205, 206—363.

But see the British "State Papers," Colonial Entry Book vol. 52, p. 88-89, August 19th, 1682. Letter from the King to Lord Baltimore. The line from Watkins' Point already settled 2° N. L.—40 N. L. fixed by the charter for northern limits and named—2° measured southward, gives Lord Baltimore to 38°. See No. 117 of the DeJarnette Papers. This supports Penn's repeated asseveration without contradiction by Lord Baltimore at the time, that he knew his boundary on the Eastern Shore did not extend south of 38° N. L. See DeJarnette Papers, Lord Baltimore's own account of his conferences with Wm. Penn. And this line thus settled did start almost exactly where 38° was then supposed to be and ran upon that line varying from it only the number of degrees (5°) allowed by the law of Virginia, and it was run from one natural object on the Bay side of the Eastern Shore peninsula Watkins' Point, to another natural object on the Sea-side thereof, Swannes Gut Creek "over the Pocomoke River."

Lord Baltimore could not settle south of 38° N. L. without taking the oaths of allegiance and supremacy. See Hen. Statutes at Large. Act 28, 1631, '2 against Catholics, and Id. against Quakers, 1659, '60. 1 H. Stats at Large p. p. 532-533.

IV.

The immense territory of the London Company was dismembered:—

1st. By the grant of Maryland to Cæcilius Calvert, Baron of Baltimore, in Ireland 1633.

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2nd. By the grant of North Carolina to the Earl of Clarendon in 1665.

3rd. By the grant of Pennsylvania to Wm. Penn in 1681, and the grant to him of Delaware.

4th. By the Treaty between Great Britain and France, called the Treaty of Paris in 1763.

5th. By the Constitution of Virginia, June 29th, 1776.

6th. By her deed of Cession of her Northwestern Territory, March 1st, 1784. (See Hubard's Report.)

7th. The compact between her and Maryland in 1785, refers merely to navigation, fisheries and the jurisdiction over criminal offences, and not to boundary.

And of these grants on settling and adjusting the boundaries between Maryland and Virginia, we need look to the Maryland and Pennsylvania grants; to the Treaty of Paris; to the first Constitution of Virginia, and to the Cession of Northwestern territory by Virginia to the United States.—And these are affected materially by the revolution in England in 1649, by the surrender of the colonies of Virginia and Maryland to the commonwealth and to Cromwell; by grants ad interim to Lord Hopton, &c; by the restoration of the Propietary rights of Lord Baltimore by Charles II. in 1669; by the privation of his charter in 1690, by William and Mary; and by his restoration to his rights in 1715. by George I. Lord Baltimore never had quiet title to Maryland, except from 1715 to 1776. But, undoubtedly at the end of the colonial state of the British Colonies in North America, Maryland had a separate and independent existence as a sovereign state, and the question recurs. What then were the limits? That question we will examine "in limine."

V.

Without going into a critical analysis and translation of the charter to Cœcilius Calvert, Lord Baltimore, in 1633.—It may for the present be conceded, for the argument, that

whatever were the boundaries fixed between the two colonies of Maryland and Virginia by the charter of Charles I. to Lord Baltimore, they were greatly changed by the "articles of surrender of the whole country of both colonies to the commonwealth and Cromwell on the 12th March, 1651."

We have seen that Lord Baltimore's charter or grant was disputed by Virginia at once, and the legal question has never been decided. The grantees of land from Virginia prior to his grant, such as that to Claiborne of Kent Island, disputed his proprietary rights to their lands from the beginning. In the midst of these controversies, the Revolution of 1649 occurred in Great Britain.

The Governor Sir William Berkely, and the Council and Burgesses of Virginia were loyal to Charles II. Charles I. was beheaded the 30th January, 1649. From that period the Commonwealth, in England, commenced; and it continued, under different modifications, until the restoration of Charles II. in 1660. Oliver Cromwell was declared Protector, on the 9th January, 1654, and died on the 13th September, 1658. His son Richard succeeded him, but abdicated in 1659. On the dissolution of the monarchy, in England, doubts existed in this country whether the powers of the Governor and Council and of all the other officers of the government deriving their appointments from them were not extinct. This gave rise to one of the provisions of the first act of the Grand Assembly, held at James City on the 10th of October, 1649, which made it highly penal to maintain such doctrine. The principle was, however, solemnly recognized by the first article of the Convention entered into between the Commissioners of the Parliament of England and the Governor, Council and Burgesses of Virginia, on the 12th March, 1651. That Convention annihilated the Royal Government and prerogative in Virginia. See Henning's Stats. at Large, vol. 1, p. 358, and see note. The first act of the Assembly, after the Regicide, proclaimed the treason of those who tried and convicted and decapitated the King,

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asserted the Royal Government as still continuing and existing; and declares all defenders of the execution of Charles I. accessory to the death of the King after the fact, and to doubt the right of succession of Charles II. was made high treason, and it was made equally high treason to propose a change of government, or to doubt the power of the Governor and government of Virginia. See Id., pages 359, '60, '61.

By Act III of this Assembly it was enacted, that the inhabitants which are or shall be seated on the south side of the Potomac River shall be included, and are hereafter to be accounted within the County of Northumberland.

By the Articles "at the Surrender of the Countrie," agreed on and concluded at James City in Virginia for the surrendering and settling of that plantation under the obedience and government of the commonwealth of England, by the Commissioners of the Council of State, by authority of the Parliament of England, and by the Grand Assembly of the Governor, Council and Burgesses of that "countrye," it was solemnly agreed and concluded: 4th. "That Virginia shall have and enjoy the ancient bounds and lymitts granted by the charters of the former Kings, and that we shall seek a new charter from the Parliament to that purpose against any that have intrencht upon the rights thereof."

Herein, by a power recognized as sovereign and absolute, both de jure et de facto, was all Royal government and authority annihilated, and the ancient chartered limits of Virginia restored to her. Whether she ever sought a new charter from the Parliament or not, the royal grant to Lord Baltimore to any of her chartered limits was annulled by *actual Convention* and *treaty*, higher and more authoritative than any judgment of the King's Bench in 1624, which enabled the King to dismember her territory or to "intrench upon it." See 1. Henning's Stats. at Large from p. 363 to p. 373 inclusive. Here it is seen that there was an entire revolution of government and its powers and authorities.

that it was by a rightful and acknowledged government destroying all royal prerogative, and by *treaty* restoring Virginia to all her original territory; and that a provisional government was organized for the colony and followed this revolution. Nothing could be more conclusive in political history, than that, if King's Bench took away the rights of the London Company, the Commonwealth and Cromwell and their Commissioners took away Lord Baltimore's rights as a Proprietary Governor of Maryland.

The third charter of the London Company prescribed that the oaths of allegiance and conformity should be taken in Virginia. The King himself could not dispense with them; and Lord Baltimore declined to take them. He evaded them by betaking his settlement to that neutral and common territory between 38° and 40° N. latitude lying between the Plymouth and the London Co. settlement. These two degrees, embracing about the distance of 100 miles, which the two companies were bound to keep between their settlements, Virginia had already granted patents to numerous settlers who had seated "dividents" in all that region. She had commissioned Wm. Claiborne a surveyor, and sent him to survey the planter's lands and make a map of the country, to make discoveries along the coast and find a fishery, between James River and Cape Cod. He and his followers settled mainly at and near Kent Island, high up the Chesapeake Bay. The charters had expressly provided "that all the lands were to be had and enjoyed in the country of Virginia by British subjects within the same, according as in the like estates they were had and enjoyed by the laws within the realm of England." The individual titles granted by Virginia before the grant to Lord Baltimore by the King, could not be disturbed by the Maryland charter. They were titles in free and common soccage, were vested and could not be annulled by the King himself. Lord Baltimore invaded or intrenched upon their private titles, and that was the cause of Claiborne's rebellion against Lord Baltimore's proprietary government.

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The great massacre occurring in 1624, and the London Co. being convulsed by violent factions, the charter was annulled by quo warranto, Virginia became a Royal Province, and the Company expired just ten years before Lord Baltimore obtained his grant and began to govern Maryland. But by that time Virginia had enacted laws for the registry of births, marriages and burials by church ministers and wardens, and there were *parish records*. That was one test of jurisdiction and boundary. In 1634 the country was divided into 8 shires, which were to be governed as the shires in England: their names were James City, Henrico, Charles City, Elizabeth City, Warwick River, Warros Kyoake, (now Isle of Wight, &c.) Charles River, Accawmack; and lieutenants were appointed the same as in England; and, as in England, *sheriffs* were elected, and sheriffs and bailiffs where need required. See 1 Henning's Stats. at Large, pp. 233, '34. See also a copy of the Rolls. Again, as early as 1623 '24, surveys for private planters' "dividents" were provided for and were to be recorded. See 1 Henning's Stats. at Large, p. 125.

Edmund Scarborough had been repeatedly elected County Lieutenant of Accomack, and was Surveyor General of Virginia when the boundary disputes first began between the two colonies. And from the beginning of the London Co. Colony the established Church of England was in full authority in Virginia, and the church divisions into parishes were arranged, and there were then complete records of vestries. Conformity was strictly enforced, and non-conformists were compelled to depart the colony. The laws against Papists and Quakers were severely tyrannical and rigidly executed. All these laws and their effects were so many tests of what settlements and population belonged to Virginia. And thus, before the grant to Lord Baltimore in 1633, the Virginia colony was completely organized, and its affairs administered in a defined territory. Lord Baltimore disturbed those settlements. At once he assumed to grant and govern the lands of those seated, as on Kent Island,

within his admitted limits, denying the prior individual titles under the Virginia grants, and he began to seat settlers beyond his limits, especially west of Pocomoke River, near its mouth on the eastern shore. The reason why the refugees from Virginia took their settlements there, will be shown hereafter.

William Claiborne stubbornly resisted the proprietary claims of Lord Baltimore from 1633 to 1635; driven out of Maryland at last, he escaped to Virginia, but was arrested and sent to England to be tried for rebellion. The Provisional Legislature of Maryland having declared against the proprietary claims of Lord Baltimore, Claiborne reappeared in rebellion against Lord Baltimore in 1644, and the latter in turn was obliged to seek refuge in Virginia, and never returned to Maryland until about 1646, when he put down the rebellion, and died the next year. His successor remained in *disturbed possession* until 1649. When lo! in 1651 William Claiborne again appeared as one of the commissioners to demand the "surrender of the whole country" to the Commonwealth of England in its second year. Not only was Virginia guarranteed "the ancient bounds and limits granted by the charters of the former kings," but also that all the patents of land granted under her "colony seal, by any of the preceding governors, shall be and remain in their full force and strength." She was granted free trade and freedom from all taxation.

The Commissioners engaged for the Parliament, and the Governor and Council and Burgesses for the whole colony on their respective parts. The Commissioners of Parliament were Richard Bennett, Wm. Claiborne and Edmund Curtis. These articles were signed and sealed by the Commissioners of the Council of State for the Commonwealth of England the 12th March, 1651, and they then proceeded from James Town forthwith to reduce Maryland, and 1652 they established for her a provisional government—Bennett, Governor and Claiborne, Secretary. From 1652 to 1654 they entrust-

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ed the government of that colony to a board of ten. The Assembly at Patuxent deprived the Catholics, notwithstanding the "toleration act," of all franchises, and a civil war ensued and lasted until the year 1657. It was only by the tact of Fendall that the proprietary government was re-acknowledged as late as 1658. And after Oliver Cromwell's death the colonial authorities of Maryland herself asserted the supreme authority of the people, and that the allegiance of the colony was due to the king. For these general facts of history see Holmes' University Series and No. 142 of the De Jarnette papers.—"Lord Baltimore's case unreased."

Thus it may well be claimed that the Colony of Maryland in turn became an Imperial Colony, by treaty with the Commonwealth of England, and that treaty was never disturbed or modified by any absolute act of Oliver Cromwell. If King's Bench, in 1624, could open the way to dismember Virginia by Royal Grant to Lord Baltimore, a fortiori the Revolution of 1649 and the "surrender of the country" in 1651, and the Articles agreed and concluded by the Commonwealth's Commissioners with the Governor and Council and Burgesses of Virginia, could restore the latter to her ancient limits. Maryland and Virginia both became imperial provinces of the Commonwealth of England, and were both within the prerogative of imperial grant. A consequence of this restoration of the limits of Virginia was that she deemed herself as having no longer any issue of boundary to settle with Lord Baltimore: and, accordingly, at a Grand Assembly held at James City by prorogation from the 10th March, 1656, to the 1st December, 1656, it was ordered: "That letters be sent unto Col. Sam'l Matthews and Mr. Bennett, that in respect the difference between us and the Lord Baltimore concerning our bounds is as far from determination as at first, they desist in that particular, until further order from this country."

They wisely desisted, knowing, doubtless, that the question of boundary would or could probably be settled without

further controversy with Lord Baltimore. And so far as the Potomac and its islands and shores are concerned, its boundary was settled by:

VI.

The Grant of the Northern Neck of the Colony of Virginia, lying between Rappahannock and Potomac Rivers.

A petition dated July 28th, 1639, addressed to the Lords Commissioners for Foreign Plantations by the Governor and Company of London for the Plantation of the Somer Isles—now Bermuda Isles—see map of 1763, (see No. 56, State Papers, Colonial, vol. 10, No. 30, with inclosure,) shows that Company was incorporated about the year 1621, and the inhabitants were not able to subsist there, and sought another place. That an agreement had been made between the Company of Virginia and the petitioners when the latter purchased the Somer Isles from the former, that the petitioners should receive a large proportion of land in Virginia, and they prayed for a grant of land situate and being betwixt the two rivers of Rappahannock and Patowmeek. This petition shows that the Northern Neck, as it is now called, was not then inhabited by English subjects, and that no grant thereof "had yet passed to any." This, with the inclosed paper, was submitted to the Lords Commissioners on the 1st August A. D. 1639.

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Then August 3d, 1663, came a letter from Charles II. to the Governor and Council of Virginia, reciting that he had granted to Henry, Lord Jermine, Earl of St. Albans, and to Ralph, Lord Hopton and others, in the first year of his reign, (he never counted the years of the Commonwealth or Cromwell, and therefore he meant in 1649, '50 or '51,) "all that tract, territory or portion of land in America bounded by and within the heads of Tappahannock alias Rappahannock and Quiriough or Potomack rivers, the courses of these rivers and Chesapeake Bay, together with the rivers themselves and all the Islands within the banks of the said rivers. And it recites that the Earl of St. Albans, Lord Berkeley,

Sir Wm. Morton and John Tretheny, assignees of the said Lord Hopton, being the surviving patentees and parties interested, had granted and demised to Sir Humphrey Hoke, Kn't, and others, the said tract or territory for a certain number of years, &c., &c.; and reciting that his letters patent had miscarried, and ordering the Governor, Council and Burgesses of Virginia to give these patentees aid and assistance. See the De Jarnette State Papers, No. 80, Colonial Virginia, vol. 59, No. 19, August 3d, 1663.

And in the Public Record Office of England, Chancery Patent Roll 21, Car. II, dated May 8th, 1667, "came the Patent or Grant from Charles II. confirming Letters Patent under the great seale of England bearing date at St. Germines the 18th day of September in the first year of our reigne unto Ralph, Lord Hopton, Henry, Earle of St. Albans, &c., &c., their heirs and assignees forever, all that entire tract, territory or parcell of land situate, lying and being in America, and bounded by and within the head of the rivers of Tappahannock alias Rappahannock and Quiriough or Pattawomack rivers, the courses of the said rivers as they are commonly called or knowne by the inhabitants and description of those parts and Chesapeyocke Bay, together with the rivers themselves. And all the Islands within the Banks of those rivers. And all woods," &c.

This recites the terms of the grant to Lord Hopton made in the first year of Charles II. reign in 1651, and there recites that "whereas the said Ralph, Lord Hopton, John, Lord Culpeper, Sir Dudley Wyatt and Thomas Culpeper being all since dead, and the said Ralph, Lord Hopton, having in his life time, by good and sufficient conveyance and assurance in the law, convied and assured all his estate and interest in the said p'mises unto John Tretheny, Esq., and his heires all the said tract, territory and portion of land," &c. "And whereas the said Henry, Earle of St Albans, &c., by their deed, &c., bearing date the nyne and twentieth day of June now last past, &c., have granted and surrendered to us the

said tract, &c., with the aforesaid letters patent to be cancelled, to the intent that we would be gratiously pleased to grante them new letters patent thereof, &c., &c. Now know ye, that we for, &c., have granted and confirmed, &c., unto the said Earle of St. Albans, John Lord Berkly, Sir William Morton, John Tretheny, their heirs, &c., all that entire tract, territory or parcel of land situate lying and being in America, and bounded by and within the head of the rivers of Tappahannock, alias Rappahannock, and Quiriough, alias Patawomack, Rivers, courses of said rivers, &c., together with all the rivers themselves and all the Islands within the banks of those rivers, &c." And after full and complete proprietary rights and powers are granted, and a covenant to supply all future defects it proceeds: "Provided always, &c., that these presents or anything herein, &c., shall not extend or be construed to extend to infringing, make void or otherwise prejudice any contracts or grants, &c., whatever heretofore made or granted by the Govenor or Govenors and Councill of Virginia of the premises, &c., &c., made before the 29th day of September in the 13th yeare of our reigne." And these grantees were prohibited from acting or intermeddling in the military affaires or forces in the territory, "or with the government or command of any of the castles, forts, &c., thereof without the order, authority and command of the Governor and Councill of Virginia for the time being, but the same shall remain, continue and be in the Governor and Councill of Virginia, &c. And that the Governor and Councill and Assembly of Virginia for the tyme being shall have full power and authority to lay any tax and impositions in and upon the said territory hereby granted."

In a word, these grantees and the inhabitants in this territory were "in all things made subject and obedient to such lawes and constitucons, as are or shall be made by the said Governor, Councill and Assembly for or concerning the said colony or the Governor thereof, &c."

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This grant was make by Writt of Privy Seal; at Westminster, the 8th day of May, the one and twentieth year of the reign of Charles II. Counting from the death of Chas. I., would be 1668, '69. Also see No. 94 of the De Jarnette papers, dated "at Whitehall," Nov. 19th, 1675.

"Present the King's Most Excellent Majestie in Councill."

The lords of the committee for foreign plantations presented to his Majesty in councill a report touching a grant to be past into his Majesty's subjects of Virginia. The petition of Francis Morgan and others, agents for the Government, Council and Burgesses of the country of Virginia and territory of Accomack.

The report of the committee approved the petition, and it was confirmed by the king in council, Nov. 18th, 1675, authorizing the governor, councill and comonalty of Virginia to purchase the lands, &c., contained in grant to the Earle of St. Albans, &c., &c.

Under these and various other papers, and laws passed to that end, the colony of Virginia became possessed of the entire territory between the Rappahannock and Potomac Rivers, embracing all the islands and waters of said rivers, and has ever since exercised jurisdiction over the same.

Not only by successful revolution, and sovereign power de jure et de facto, was Virginia, by the treaty-making power itself, restored to her ancient limits, but her boundary and jurisdiction on the Potomac River was fixed by Royal Grant as well as by the Articles of Surrender to the Commonwealth

Lord Fairfax fixed the initial mark of boundary at the head spring of the North Branch of the Potomac under his title, and prevailed against the Lord Proprietor of Maryland, who claimed not only the whole of the Northern Neck of Virginia, but to the south bank of Acquia Creek. See the map of his own "achievement," with his coat of arms, in Ogleby's History. And Lord Fairfax, under Virginia laws, always claimed the Potomac River and its islands, and Vir-

ginia always exercised jurisdiction, in various ways, over them, as will be hereafter shown. See the Surveys by Lord Fairfax hereto appended. Indeed, it was always a matter of dispute whether the original grant to Lord Baltimore could reach as far west as the head spring of either branch of the present Potomac. The river to which the name Potomac was given was the Quiriough. That river, at the date of the grant to Lord Baltimore, in 1633, was not known higher up than its falls, and the country west of the Blue Ridge was not explored, certainly not settled, for a century after that date. See Kercheval's History of the Valley of Virginia.

The north branch of the Quiriough was the Cohongaroota, and the south branch was called the Wappopocomo. If the name Potomac, in the Baltimore grant, meant the Quiriough, as undoubtedly it did, (see the alias named in the grant to Lord Hopton,) then the line of Maryland running by the line of 40° N. latitude until it came to the meridian of the most western head spring of the Quiriough, would have to stop far east of the meridian of the head spring of the Cohongaroota. But Lord Fairfax and Lord Baltimore fixed the boundary by the Fairfax stone, as found by Michler; and Michler's report shows a curious result of survey in demonstrating, perhaps, what the words "ulteriorem fluminis ripam," in Baltimore's grant, meant. Michler, in making his survey, could not, of course, begin to run a line south from the parallel of 40° N. latitude until he first found the head spring, the meridian of which he was to run. He searched for and found the spring and stone marked by the Fairfax initials, and then run his meridional line north until he crossed or came to the parallel of 40° N. latitude. In doing so, he found that within four or five thousand yards north of the stone and spring his meridian line struck the Potomac River, there running *northwest*. Instead of running south from the parallel of 40° to the spring, he was running north from the spring to the parallel, exactly the reverse of

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the course required by the grant. The grantor, as it were, standing on the parallel of 40°, gave a line inclining south from the meridian of the spring to the ulterior bank of the river *from his stand point on the parallel*. The river running there northwest and then deflecting west and south until it takes its general course southeast, the ulterior bank of the river was geographically the *left* bank thereof. The line thus mathematically was fixed on the north side of the Potomac. Any one can see this by the simplest diagram. The ulterior bank of the river is the south side, where the meridian of the spring cuts it, but it is the north side in the general course of the river.

But the reply to that is: that the line was to run to Cinquack, and Cinquack is placed on Smith's map on the south side of the river. What did Cinquack mean? A point or place, a wigwam, a chief's residence, or a territory? Certain it is that by the charter the line of the western shore of the bay was to terminate *where the river disemboques into the bay*, and there is no place on Smith's map called Cinquack *there*. The name Cinquack is put on Smith's map at or near the mouth of the Great Wicomonico, some five or ten miles south of the mouth of the Potomac River, or where it disembogues into the bay. Again, we know that Smith misnamed several rivers and places, as for example, he called the Pocomoke the Wycho on the eastern shore. (See Record of Accomack County Court in 1663 as to the true Pocomoke, and Calvert and Scarburgh's Report in 1668, showing where the Pocomoke was known to be in that day.)

But this is all mere curious speculation now, for whatever was the Potomac line under the grant to Lord Baltimore in 1663, it was changed by the surrender of the country in 1651, and the Grant of Charles II. the same year confirmed in 1668-'9 to Lord Hopton and others. It was changed, it over on the south side, to the north side of the Potomac, by the most plenary power of both the Commonwealth and the Crown.

At first the line on the western shore may have terminated on the south headland of the Potomac River where it disembogues into the bay, but after the restoration of Charles II. it terminated on the north headland of that river, at the extreme southeastern angle of Point Lookout. And this change (as will be shown hereafter) is still shown and proved by marks and monuments remaining yet on Smith's Island in the Chesapeake Bay. See Depositions as to them.

VII.

And this brings us to inquire: How, when, and by what modifications of his old charter, or by what new charter, if any, was Lord Baltimore restored to his rights?

He was certainly more than suspected by Charles II. of disloyalty to the Crown, and that was certainly cause of forfeiture of any Royal Grant to him. See No. 142, De Jarnette Papers.

The Commonwealth had deprived him of the whole of his power and province, and restored it to the Colony of Virginia. How much of it did the grace, mere grace of Majesty restore to him? If his Corporation was gone, did he have anything left but mere proprietary, individual rights? He had to be restored to something:—to what was he restored? It is utterly denied that the grant to Lord Hopton, expressly placed under the colonial jurisdiction of Virginia by charter, was ever disturbed by "quo warranto," or by King's Bench, or by King. It remains unimpeached to this day, and is binding on both States.

It is insisted that he was given back, and could be given back, the parts of his original limits so far, on the western shore, as to the north bank of the Potomac. The King, whilst Lord Baltimore's title was taken away under the sovereignty of the Commonwealth, and Maryland was thereby under Royal Grant, gave the river Potomac under the great seal of England to Lord Hopton and the Governor and Council and Burgesses of Virginia. Nothing could undo

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that grant but the King's Bench. The King, after the grant, could not, of his own motion, revoke it by giving it to another, without the judgment of that Court. Did the King, Charles II., impose new conditions or new limits upon Lord Baltimore's grant?

It is insisted he might do so; and, even if that be an error of opinion, and the King might not be able to do so without his consent, yet did he consent and take anew by his acceptance of any new terms, conditions and limits? If so, what?

We know that Lord Baltimore's grant was lawfully modified to a great extent, but how far with his own consent we are not informed. However that may be, and whether the onus of showing belongs to Maryland or Virginia is not material, for we know

VIII.

There had been a controversy respecting the boundary of the two colonies, and in 1663 it was brought to a specific and pointed issue. The laws of conformity had pressed so hard in Virginia upon the Quakers and other non-conformists, that they were driven on the Eastern Shore, then called Accomack, to the north and west of the mouth of the Pocomoke. A glance at the map will show that river runs from the northeast of the peninsula until it comes near to its mouth, east of Cedar Straits, and there it suddenly widens into a Sound of considerable width, and the part of its north bank embraced by the lands of Little Annamessex River, between that and the Pocomoke Sound, consists mainly of salt marshes, not then desirable for settlement, and then not easily accessible from Accomack. Being tolerated in Maryland and not in Virginia, the refugees from Accomack congregated in the Little and Big Annamessex territories up to Manokin River. But eight square miles of this territory, claimed by Virginia, was terra firma or arable land, and it was inconvenient to be visited by any sheriff of Virginia to collect taxes or for any other purpose.

Lord Baltimore's deputies seeing this, began to encourage this settlement and to grant patents in that region. No patents were sought by these refugees east of the Pocomoke River, and thus on that side of the river no dispute arose after the year 1668 about boundary. Edmund Scarborough, the Surveyor General of Virginia in Accomack was, with others, employed by the Lord Proprietor of Maryland to conduct settlements to the Annamessex rivers. Finding that he was aiding to strip his own colony of her territory, and that his employment by Maryland was incompatible with his official duty to Virginia, he exposed the policy of Lord Baltimore to acquire that territory by settlement, and caused the final adjustment in 1668. See the Maryland Records: first one labelled "No. 3, State Papers, Council Record Book, 1656, '68.

Second—the other labelled "No. 4, State Papers, Council Record Book, 1669, 1673."

These books, with others of the archives of Maryland, are now in the safe-keeping of the Maryland Historical Society, in Baltimore, and were adduced by the Commissioners on the part of Maryland. The first shows the disturbances about settlements on the eastern shore of the Chesapeake Bay, and the correspondence of the governments of the two colonies respecting boundaries and the incroachments of settlements. The second shows a full and final settlement of the whole question of boundary and patents on the eastern shore at Big and Little Annamessex rivers and Pocomoke Sound, and thence to the Atlantic Ocean by a right line east.

Edmund Scarborough was a man of great ability and energy, was a man of large means, being a considerable patentee from Virginia, and, perhaps, Maryland too, and had actually been in Lord Baltimore's service, employed by him with others, to cause the refugees and others from Virginia to settle down as low as Little Annamessex; but Scarborough found the settlers under the Lord and Proprietary of Maryland incroaching on the territory of the Colony of Virginia,

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of which he was Surveyor General on the eastern shore of Virginia from the Wicommico River north to the Pocomoke Sound south. This caused the collisions between him and Mr. John Elzey in 1663, and the correspondence between the Governors of Maryland and Virginia. Maryland sent Commissioners to James City to confer on the matter and to adjust it. The 9th Act of the General Assembly of Virginia, in 1662, was: "To prevent Assemblies and Conventicles of Quakers," &c. The 68th, 69th and 70th of the same year provided for, 1st. Grants of Land; 2dly. Deserted Lands, and 3dly. Seating of Lands; which explains the reason of patents for the same lands to different persons. Act 78th, of the same year, provided for what was afterwards called processioning of lands: to be done by view of certain select *neighbors* of the boundaries. *There* were no *neighbors at Annamessex loyal to Virginia west of Pocomoke.* They all claimed the protection of Lord Baltimore against the intolerance of the Established Church in Virginia. For this reason there could be no processioning in all Annamessex. But the refugees never settled east of the Pocomoke, because it brought them in neighborhood of their persecutors, and accordingly three loyal "neighbors" could be selected who were willing to do the marking and re-marking boundaries east of the Pocomoke. Thus there was no processioning on the west, whilst it was regular on the east side of that river. This left the way open to the incroachments of Maryland settlers.

This assemblage of Quakers and other refugees from Virginia in Annamessex, and controversy respecting incroachments on the limits of the Virginia Colony, caused the Grand Assembly held at James City Sept. 10th, 1663, 15th year of Charles II., to pass Act 2d: "An Act concerning the bounds of this Colony on the Eastern Shore."

"His Majesty's interests on the Eastern Shore of Virginia, together with some concernments of Lord Baltimore's coming into consideration of the Right Honorable Governour and

Council and Burgesses of this Grand Assembly, they pretermitting for the present some other of His Majesties concerns of Land until a fitter opportunity, do think fit for the present to Enact. And be it further enacted by the said Right Honorable, the Govenour, Council and Burgesses of this Grand Assembly, and the authority thereof; That publication be made as soon as possible by Coll. Edmund Scarbrough, His Majesties Surveyor General of Virginia, comanding in His Majesties name all his inhabitants of the Eastern Shore of Virginia, from Watkins' Point southward, to render obedience to His Majesties Government of Virginia, and make payment of His Majesties rents and all publick dues to His Majesties Colony of Virginia. And whereas it has been controverted by some ignorant, ill disposed persons where Watkins' Point, the Lord Baltimore's southernmost bounds on the Eastern Shore, is situated, This Grand Assembly, by the care and special enquiry of five, able, selected Surveyors and two Burgesses, and, on the due examination thereof, conclude the same place of Watkins' Point to be the north side of Wicocommico River on the Eastern Shore, and near unto and on the south side of the Streight Lymbo, opposite to Potuxent River. Which place, according to Capt. John Smith and discoverers with him in the year 1608, was so named, being the said Lord Baltimore's bounds on the Eastern Shore; within which bounds His Majesties subjects, which now are seated, are hereby commanded to yield due obedience at their perils. An in case the Lord Baltimore's Lieutenants or Deputies shall not be fully convinced of his or their actual or pretended intrusions, This Grand Assembly of Virginia in due obedience making this particular part of Virginia their present care, on His Majesties behalf do engage and command Coll. Edmund Scarbrough, Mr. John Catlett and Mr. Richard Lawrence, or any two of them, whereof His Majesties Surveyor General to be one, That upon convenient notice and assignment of time and place at Monakin, or any other part of His Mjesties country of Virginia on the Eastern Shore, they or any

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two of them as aforesaid, shall give a meeting to the Lord Baltimore's Lieutenants or Deputies, or his or their Substitutes as aforesaid, the account whereof to be returned to His Majesties Governour and Council of Virginia, and debate and determination thereof; and in the mean time all inhabitants on the Eastern Shore as aforesaid, are required in His Majesties name to conform due obedience to this Act of Assembly. Be it also enacted, that the Surveyor General of Virginia aforesaid is hereby commanded and authorized to improve his best abilities in all other His Majesties concerns of land relating to Virginia, especially that to the northward of forty degrees of latitude, being the utmost bounds of the said Lord Baltimore's grant, and to give an account of his proceedings therein to the Right Honourable Governour and Council of Virginia."

This act brings us to consider the charter to Lord Baltimore, in order to explain why Virginia claimed as high up the bay as near to the Patuxent. That charter, as read inattentively, calls for a "Watkins' Point," with a "Wycho River on the west."

Edmund Scarbrough executed this law with "fourty horse," taken with him "for pomp of safety." See his report, hereto appended, characteristic alike of the man, of the times, of the people of Annamessex, and of the nature of the controversy. It brought him into collision with Elzey and others, and he put the "Broad Arrow" over their doors. More patents than ever began to issue from Lord Baltimore to settlers as low down as Pocomoke Sound, and the Court of Accomack took up the issue and vouched that the Pocomoke was not the Wycho and never had been so called.—And they were right. See Augustine Herman's Map. It was urged by Virginia that if that river was the Wycho it had no Watkins' Point on the east of it; and if there was a Watkins' Point on the east of it, it was not the Wycho. See the records of the Court of Accomack, appended to Scarbrough's report.

The description in the affidavits of this record of Watkins' Point exactly corresponds with the initial point adopted afterwards by Scarbrough and Calvert. It is just as far north of Cedar Straits as the eye can see in a clear day. A "*spiral point*," but to understand this part of the line we must refer to

IX.

THE CHARTER OF MARYLAND.

In the British State Papers, Colonial, vol. 43, No. 240, is "a memorandum concerning Maryland."

It describes Virginia as a tract of land lying from 45 to 34 degrees N. latitude; that it was divided into two colonies, the one lying from 34 to 40 degrees, the other from 40 to 45 degrees, and it proceeds to state that, "in 1632 Cecil, Lord Baltimore, upon suggestions that there was a certain tract of land in America, not inhabited by Christians, (as appears by the preamble,) obtained that charter whereby Maryland is now held, and for the possessing himself thereof used great violence in driving away such of the people out of that part, formerly called Virginia, as would not submit to his authority," &c. See De Jarnette Papers, No. 137. This confirms the paper, already cited, headed "Considerations, &c. of Lord Baltimore's Patent," which states that he did represent to the king that the country was settled by "salvages"—the country of the "100 miles apart between the Plymouth and the London Company's Settlements, between 38° and 40° N. latitude." He obtained his charter, and the territory is described by the following and what seems to be the best translation of it:—

"All that part of the Peninsula or Chersonese lying in the parts of America between the ocean on the east and the bay of Chesapeake on the west, divided from the residue of the same by *a right line* drawn from the *promontory or headland called Watkins' Point*, situated near the bay aforesaid, near the river of Wighco on the west, unto the great ocean

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on the east, and between that boundary on the south, unto that part of the estuary of Delaware on the north, which lieth under the 40th degree of latitude north of the equinoctial, where New England is terminated; and all the tract of that land within the metes underwritten, to wit: passing from said estuary, called Delaware, in a right line, by the degree aforesaid, unto the true meridian of the first fountain of Potowmack, thence verging towards the south to the further bank of the said river, and following it by the western edge, where that looks to (or inclines) to the south, unto a certain place called *Cinquack*, situated near the mouth of the same river, where it disembogues into the aforesaid Bay of Chesapeake, and thence, by the shortest line, unto the aforesaid promontory or place called Watkins' Point."

On the words of this grant it will be observed:—

1. It provides for the boundaries on the *eastern* shore of the Chesapeake.

2. For those on the *western* shore of that bay, and for the closing line between the eastern and western shore.

3. The part granted was to be divided from the residue of the peninsula "*by a right line.*"

4. That line was to be "drawn *from the "promontory or headland called Watkins' Point.*"

5. That point was situated near the bay aforesaid (near the river of Wighco or Wycho) on the west.

6. The "*right line*" thus drawn from that *promontory* on the west, was to run "unto the great ocean (the Atlantic) on the east."

7. That line, thus run, was to be the *southern boundary* of the grant to Lord Baltimore on the eastern peninsula or Chersonese of the Chesapeake.

A dispute arose about where the true Watkins' Point was, which culminated in the Act of Virginia in 1663, the appointment of the five Surveyors and two Burgesses, with the Surveyor General at their head, to demand obedience to the

Royal Government of Virginia as high up as the "Limbo," (meaning Strait) now called Hooper's Straits, to the only promontory on or near a river Wighco, on the western side of the eastern shore. Smith mistook the Pocomoke for the Wighco, and why? Because, as his map shows, he thought he found King Wighcocomoco's house on its bank, and it was his wont, in many instances, to name the great waters, such as bays and rivers, after their kings. King Chesapeack, at the site south of what is now called Hampton Roads, in Princess Anne County, Va., gave the name to the bay. Powhatan, high up the James, to that river. Smith gave the name of King Patawomeck to what is well known to have been called by the Indians the Quiriough. It was for that reason that the map which Lord Baltimore caused to be "achieved" for Ogilby's History and Herman's map, which he vouched to be accurate, have his bounds dotted on the south side of Acquia Creek, it being what Smith called the Quiriough. Smith laying that branch down as the Quiriough, and the Quiriough being what was called and meant by Potomac, he claimed south to the head of the branch now coming from the west and emptying into the southern bend of the Augemoy reach of the Potomac River. See Nos. 96 A and 96 A of the De Jarnette Papers; Ogilby's History and map of Maryland, and also Augustine Herman's map. There is also the Susquahanaugh, which Smith named after its king. Thus from the head to the mouth of the bay, the principal rivers, and the bay itself were named by this first explorer after the names of the chief Indian kings. But Smith called several rivers and points by *English* names, as Gunter's Harbour, Smith's Isles, Peregryn's Mt., at the head of the bay; Willowby's River, Small's Point, Sparkes' Point, on the western shore, north of the Potomac River, and Barnes' Point, Winstone's Isles, Mumford's Point, Russell's Isles, Limbo, Watkins' Point, Keal's Hill, on the eastern shore. Four of the points on the eastern shore were named after four of his men on the expedition; two, we are told, were north of the Limbo, (Hooper's Straits,) and two, Watkins'

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and Reade's points, were south of that Strait. He lays down both of these points south of Limbo, and neither as a mathematical point made by the extreme of a neck or promontory or tongue of land, but both as a neck or promontory or headland or tongue of land, projecting for some distance into the waters where they lie from the main land. He lays down Reade's Point or promontory or neck, on what he calls the Wighco, at its mouth, where it disembogues into its Sound. Watkins' Point he lays down on the neck or tongue or geographical point formed between what is called Big Annamessex and the Pocomoke Bay or Sound. Maryland claimed to go to the extreme of the point south, because it was on the Wighco. Virginia claimed that it was on the Wighco, but the Pocomoke was not the Wighco, but that the Wighco was farther north, where it is now acknowledged and laid down on all the maps. Maryland argued, whether the Pocomoke is the Wighco or not, there identically on the Pocomoke for the Wighco, or on the Wighco for the Pocomoke, Smith laid down a place which *he called by an English name*, and he could not mistake about that name, however he may have mistaken the Pocomoke for the Wighco or any other Indian names. He named that name himself. To this Virginia replied: two natural objects are named as guides of the location both; a Watkins' Point near a *river Wighco on the west*. If the Pocomoke had a Watkins' Point near it, the Watkins' Point there had no Wighco near it, and the river was the major natural object to control bounds. She knew there was a Wighco, and but one Wighco River on the Peninsula east of the bay, though there are several Wighcos on the western shore. The Wicomoco emptying into Monie Bay, mouthing near Nantaquack (now Nanticoke) River, true had no Watkins' Point on it, but no Watkins' Point, laid down by Smith, had any Wighco near it. The Wicomoco mouthing through the Limbo was nearer to Mumford's Point. On this ground Virginia sent her Scarborough expedition to the disputed territory in Annamessex in 1663. And to show how Smith

mistook Indian names or misapplied them, he called the river mouthing at Mumford's Point the "Rappahannock River," when no such name was ever known at all by the English settlers at any time on the eastern shore of the Chesapeake. But there is one error apparent in the map of Smith which trigonometry and astronomy detect; his parallels of latitude are laid down not less than 20 miles too far south. All the Russell Isles are placed north of 38° N. lat., and Watkins' Point is laid down north of that parallel too. Would Maryland consent to run the line to any point north of that parallel then or now? We will see what her response to that question was in several instances. Lord Baltimore had consented and acknowledged to the parallel of 38° as his true eastern shore boundary on the south. See his answer as to his bounds adopting Augustine Herman's map, which it is believed is the original of Ogilby's map furnished by Lord Baltimore himself, having his coat of arms printed on it, and said to be his own "achievement" on its face. If Maryland goes by the map of Smith, she will not reach the 38th parallel; if she goes by Herman's map she will be exactly on that parallel on the eastern shore. But it is idle to be exposing this confusion from early maps, or this conflict of claiming the Watkins' Point by Smith and the parallel by Herman; when both were wrong, and when the 38th parallel divides the mouth of the Potomac exactly, and is the exact equipotent of the line which was run by the colonies in five years from these disputes of 1663, and this brings us to

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X.

The line run by Philip Calvert and Edmund Scarbrough in the year 1668.

The Lord Lieut. of Maryland continued to grant patents just at this time from 1662, and the colony of Virginia being resolved to bring the inhabitants of the disputed territory into subjection and obedience; and they being refugees from intolerance and dreading to come again under the oppression

from which they had fled for the sake of religious freedom, danger of a serious collision between the royal government of Virginia and the settlers on the Annamessex land became so threatening, that the Governor of Maryland invoked the co-operation of the authorities of Virginia, and sent an embassy to James City to complain of wrongs and to arrange some mode of adjusting and settling the whole controversy in respect to boundary and titles to lands. In book of MS. labelled "No. 3, State Papers, Council Record Book" dated from 1656 to 1668 of the Maryland archives, the preliminary correspondence and proceedings will be found. The result was that Philip Calvert, the nephew of Lord Baltimore and the Chancellor of Maryland, on the part of Maryland, and Edmund Scarbrough, Surveyor General of Virginia, on the part of Virginia, were appointed Commissioners to settle the whole question.

They were instructed "*to meet upon the place called Watkins' Point and thence to run the divisional line to the ocean sea, &c.*" This instruction they obeyed, and on the 25th day of June, 1668, they made their report under their hands and seals. They reported:

1st. That "*after a full and perfect view taken of the point of land made by the north side of Pocomoke Bay and south side of Annamessex Bay*, they have and do conclude the *same to be Watkins' Point; from* which said point so called, *we have run an east line agreeable with the extremest part of the westernmost angle* of the said Watkins' Point *over Pocomoke River, to* the land near Robert Holstons, and *there* have marked certain trees which are *so continued by an east line* running *over Swansecacute Creek* into the marsh of the sea side, *with apparent marks* and boundaries which by our mutual agreement according to the qualifications aforesaid are to be received as the bounds of Virginia and Maryland on the eastern shore of Chesapeake Bay."

And there is no doubt, and it is now admitted by the present Commissioners of Maryland, who have acted as Com-

missioners on these bounds heretofore, that these articles of agreement and this settlement of boundary as reported, were approved and confirmed by Lord Baltimore, and they certainly were by the State of Virginia. And though the line was thus definitely and distinctly marked and acquiesced in and recognized from 1668, and had been known by its apparent marks, which still exist and have existed for 184 years, yet as soon as the oyster fisheries became valuable, and begun to yield revenue to the State having jurisdiction over them, the county authorities of the State of Maryland on the Eastern Shore began to encroach, first upon the territory of Smith's Island, and then upon the waters of Tangier Sound. (See S. Bradshaw's deposition.) And though the question has been since settled by adjudications in the courts of Somerset County, Md., as late as 1854, in favor of the line claimed by Virginia, (see Records of Somerset Co., Md., Court,) yet Maryland still persists in claiming territory and waters far south of the line established in 1668 on the joint and sealed and confirmed agreement of the Commissioners, Calvert and Scarborough. It is inconceivable how the boundary line on the east side of the Chesapeake Bay, between Maryland and Virginia, thus and then established, can be disputed or doubted.

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1st. *By the original grant* of the province of Maryland the line on the eastern shore *was to be "a right line."*

2d. That "right line" was to be "drawn *from* the promontory or *headland* called *Watkins' Point*, situated upon the bay aforesaid, (the bay of Chesapeake) near the river Wighco on the west unto the *main ocean* on the east."

II.

The Articles of Agreement between Philip Calvert and Edmund Scarborough show—

1st. That they were men of considerable rank, and both high officials of their respective Provinces—the one Chancellor of Maryland, and the other his Majesty's Surveyor General of Virginia.

2d. That each of them were acting under full authority; the one "*deputed* by the *honorable*, the Governor of the Province of Maryland, to *treat* and *conclude* upon the *bounds* of the said *Province*," and the other "*authorized* and *commanded* to ..y out the *bounds* of Virginia."

3d. That in order to enable the Surveyor General of Virginia to execute the commands of his Royal Majesty's Commission to him, "setting out the bounds of Virginia with a reference to his Majesty's hon'ble Gov'r and Council of Va., his Majesty's hon'ble Gov'r and Council had, by *letter*, moved the hon'ble, the Lord Baltimore's Lieut. General of Maryland, to appoint some fitting person *to meet upon the place called Watkins' Point with the Surveyor General of Virginia*."

4th. "*And thence to run the divisional line to the ocean sea*," &c.

Such were their full powers, and such their clearly expressed instructions. They were to "meet" together *upon the place called Watkins' Point*, and THENCE to run the divisional line to the ocean."

What did they do? Their report clearly shows—

1st. That the hon'ble "Philip Calvert, Esq., Chancellor of Maryland, being fully empowered by the Hon'ble Lieut. General of Maryland, and Edmund Scarborough, his Majesty's Surveyor General of Virginia, first took *a full and perfect view of the point of land made by the north side of Pocomoke Bay and south side of Annamessex Bay*."

2d. That they "*concluded the same to be Watkins' Point*."

3d. That "from said point, so called, they *had run an east line*."

4th. That they had "run an *east line from* that point," agreeable with the *extremest part* of the westernmost angle of the said Watkins' Point."

5th. That they run said east line from the extremest part of the westernmost angle of Watkins' Point, "over *Pocomoke River*," not up it, and then to either bank, but "*over it*."

6th. That they run this *east* line *from* said point "TO the land near Robert Holston's."

7th. That *there*, near Robert Holston's, they had *marked certain trees.*

8th. That they had so "continued their marks" by an *east line.*

9th. "Running *over Swanseacute* (*Swanseagut* it ought to be) *Creek* into the marsh of the *sea-side.*"

10th. "With *apparent marks and boundaries.*"

11th. "Which line, *by their mutual agreement*, according to the qualifications aforesaid, *were to be received as the bounds of Virginia and Maryland on the eastern shore of Chesapeake Bay.*"

12th. And "in confirmation of their concurrence" they conclude by adding: "*we have set to our hands and seals* this 25th day of June, 1668." Signed,

PHILIP CALVERT, [SEAL.]
EDMUND SCARBROUGH, [SEAL.]

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And these bounds, by this *east* line *from* Watkins' Point, thus ascertained and the very *part* of an *angle* of it specified *from* which the line was run to the ocean-sea, *was* received by both provinces, at the time and ever since until lately, "*as* the bounds of Virginia and Maryland on the eastern shore of Chesapeake Bay." The archives of Maryland and her Somerset and Worcester County records show it, and her best historians attest it. McMahon, in his History of Maryland, after relating the disturbances between the two provinces about settlements on the eastern shore, (vol. 1, pp. 20, 21, edition of 1831, by Lucas, &c.) says:—

"The entreaties and remonstrances of the former (the Governor of Maryland) were at last crowned with success, and Commissioners were appointed, viz: Philip Calvert, on the part of Maryland, and on the part of Virginia, its Surveyor General, Edmund Scarbrough, who were empowered

to determine the location of Watkins' Point and to mark the boundary line between the two colonies, running thence to the ocean. By them this duty was fully discharged on the 25th of June, 1668, and in consummation of it, certain articles of agreement were drawn up and signed by each of them, on behalf of their respective governments, in one of which they designate the point of land made by the north side of Pocomoke Bay and the south side of Annamessex Bay as Watkins' Point, and the divisional line between the two colonies *to be an east line*, run agreeably with the extremest part of the westernmost angle of said Watkins' Point, over Pocomoke River, and thence over Swanseacute Creek into the marsh of the seaside, with apparent marks and boundaries."

Again: John Kelty, "Register of the Land Office for the Western Shore of the State of Maryland," and author of a book entitled "Landholders' Assistant" and "Land Guide," being an exposition of original titles, &c., published by G. Dobbin & Murphy, at Baltimore, in 1808, page 164, says:—

"The Proprietary's Government claiming the beginning of his patent, where it was afterwards acknowledged to be, and finding that settlements *had been commenced in that quarter under the authority of Virginia*, commissioned John Elzey and two other persons to repair to the place and grant warrants, under particular and favorable conditions, to such as would take them. On the arrival of these Commissioners, and notice of their errand, a demand was made by Edmund Scarbrough, Surveyor General of Virginia, that they should acknowledge obedience to his Majesty, as being out of Lord Baltimore's jurisdiction, and he proposed, at the same time, the appointment of Commissioners to determine the situation of Watkins' Point. Elzey and his associates paid no regard to this proposition, but continued to *fulfill the views of the Proprietary by encouraging surveys and settlements under his patronage*. The dispute was at length terminated by Philip

Calvert, Chancellor of Maryland, and the above named Edmund Scarbrough, appointed Commissioners for the purpose, who, on the 25th of June, 1668, *being met on the spot*, signed two instruments of agreement; by one of which they determined the point of land made by the north side of Pocomoke Bay and south side of Annamessex to be Watkins' Point, intended in Lord Baltimore's charter, and the proper divisional line between Maryland and Virginia, to be an east line run by them agreeably with the extremest part of the westernmost angle of the said Watkins' Point, over Pocomoke River, to the land near Robert Holston's, where, say the Commissioners, we have marked certain trees, which are so continued by an east line running *over Swansecoute Creek* into the marsh of the seaside, with apparent marks and boundaries. By the other instrument they adjusted everything that concerned the rights and interests of those patentees or settlers whose situations were changed by the settlement of said divisional line."

Thus what Calvert and Scarbrough said and did A. D. 1668, Maryland's own register of original land titles vouched and admitted in 1808, and one of Maryland's brightest jewels, as well as jurists, John V. L. McMahon of the Baltimore bar, among the most illustrious, vouched, as late as 1831, just before or about the time when the dredging for oysters became so valuable as to make the Annamessex people begin to doubt and start new and old traditions about "*where is Watkins' Point?*" And it must be remembered too that whilst McMahon admitted that Watkins' Point was finally and fully ascertained in 1668, and that an east line was run then from a defined and specified part thereof on the eastern shore to the ocean. There was not a son of Maryland who opposed the claim of Virginia to the north shore or bank of the Potomac River on the western shore with more zeal and knowledge than he did. He was exceedingly jealous of Maryland's rights, was devoted to the religion of the founders, familiar with the archives, a master of her laws, and her strong and eloquent champion of boundaries. He had quee-

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tioned every inch of land and water, and argument claimi
them to the Potomac. But he was too fair and candid
historian to contradict Maryland's own acts and records r
specting the eastern shore boundary.

See also McMahon's Maryland, p. 91, touching the boun
of Somerset County. See also Bozman's History of Mar
land, vol. 1, p. 247, 8, 9 and note, and p. 262.

There could not be a report of commissioners on any su
vey more in obedience to the requirements of the case, mo
in conformity to the instructions of the joint authorities u
der which they acted, and more exact in defining every pa
ticular of their initial point, of the points passed in rig
line from that to the extreme shore of the east, of th
national objects it touched, and of its place of terminou
See De Jarnette Papers, No. 22. The translation of Lo
Baltimore's charter there is written thus, "by a right li
drawn from *promontory* or cape of land called *Watkin
Point*, (situate in the aforesaid bay near the river of Wig
co,) *on the west*." By putting the words in brackets as her
all confusion is cleared up.

The meaning of the charter unmistakably is "Watkin
Point" on the west of the peninsula, situate, &c. The li
then was run *from* west *to* east. It had to run from west
east from that point "over Pocomoke River." It was mar
ed by apparent "marks and boundaries," numbering u
wards of 30 still remaining; any two of which identi
and verify it for its whole course. If its initial point, th
part of Watkins' Point which was its westernmost angle w
entirely washed away, the still apparent "marks and boun
aries" demonstrate its course with mathematical certain
and precision. If it was a due east course, then one sing
mark enables us to give it precise location for its who
length. No matter what course it was run, if it was
"right line" then any two marks on it will determine i
course. If the *initial point* don't *now* exist to show whe
the line began; the *line* exists to show where the initi

point was in 1668. But Watkins' Point does exist, and the part of it then named from which the line was run. The westernmost angle then is still not only pointed to by the marks and boundaries of the line which was run, but *it is still the westernmost angle of Watkins' Point.*

Watkins' Point is not only the initial point of the line on the eastern shore, but it is the initial point of the whole boundary line of Maryland, and it is both the *initial and closing point* of all the lines between Maryland and Virginia. No matter which way the line, after running up the Delaware to the 40th parallel, after passing west on that parallel, after turning south on the meridian of the first fountain of the Potomac River, after striking either bank of that river right or left, and running down to either Cinquack at Smith's Point, or to Point Lookout, it had to close at Watkins' Point. Now is it reasonable, not to say reputable, to suppose that two provinces and two States like Maryland and Virginia, in all the time of their colonial and sovereign existence, never found and agreed upon the initial and closing point of their divisional lines? So that it can be certainly indentified and verified now? It is too preposterous to be presumed, and if pretended merely it can be disproved.

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Calvert and Scarbrough strictly obeyed their instructions. They ran "a right line" *straight*, geometrically "the shortest line that can be drawn between two points. A right line may be horizontal, perpendicular, or inclined to the plane of the horizon." It is said the line was not run due *east*. It was not required by the charter to be so run. It was to be drawn from the promontory or head land called *Watkins' Point* near the river Wighco *on the west*, unto "the main ocean on the east. They met on the place called Watkins' Point. They indentified the location of Watkins' Point" after "taking a full and perfect view of it, to be the point of land made by the north side of the Pocomoke Bay and south side of Annamessex Bay." *That they concluded on the plan itself* where Smith's map lays it down; not a math-

ematical point without length, breadth, or dimensions, but a tongue or point of land, a geographical tract of country forming a promontory between Annamessex and Pocomoke Bays. The Big Annamessex is the river meant, not the Little Annamessex, now, but not then mapped. The latter had no bay. The promontory is laid down by Smith in form very like as it is laid down now on the chart of the coast survey. It is in extent from north to south about 10 miles in length, its general line of coast being nearly due north and south.—Its whole surface pointing to Tangier Bay or Sound in a general southwest course; and it is an average width of from five to seven miles, the terminus or southern point of the promontory is now as it was laid down in Smith's map of 1628-9, at what is now called Cedar Straits.

The little Annamessex River, as it is now called, a creek, not widening into any bay before it mouths into Tangier Sound, laid at the time of Smith's map, as it lies now, midway, precisely, between Big Annamessex Bay's southern headland and Cedar Straits, the terminus of the promontory of Watkins' Point, and the north headland of Little Annamessex was, by Smith's map, as it is now, the "*westernmost angle*" of the coast of the promontory of Watkins' Point. It is *the* promontory of Watkins' Point, and the only promontory of that point projecting into the Tangier Bay. The point of the main land is not a "promontory" at all; it cannot so be called, either in the language of navigation, geography or geometry. It projects into a shallow, narrow thoroughfare, not considerable enough hardly to be called a "strait," is veiled entirely by groups of islands east, west and south of it, and not navigable except by small canoes at high tide. The part of Watkins' Point which is its westernmost angle, taken by Calvert and Scarbrough, is a "headland," is a "point," is a "promontory" projecting from the shore "into the bay or other expanse of water," a small cape "or tract of land" extending into the sea or a lake or river, *beyond the line of the shore*, and it can be sailed around

and "*doubled*" by navigation. A promontory differs from a cape in denoting *high land*. Low land, projecting beyond the line of the coast into the sea, may be a *cape* or *headland*, but it must be high land, comparatively, to be a promontory. In that sense even the north headland of Little Annamessex, the westernmost angle of Watkins' Point, as compared with the point at Cedar Straits, is the "promontory" of the ten miles coast of Watkins' Point. All the land along that coast is marshy and flat, but this angle is high enough to be sandy, with some elevation higher than that at Cedar Straits. But whether the most prominent part of Watkins' Point be the initial point of the survey or not, *it was made the part for the initial point.* There the point started, not only for the reason that it was the westernmost angle of the coast, but because it was midway the length of coast, it was fairest and most equal and just. They could not start a line from each and every part of a geographical point ten miles long—they had to agree upon a *part* of the point as the initial part for the line that had no breadth. If they began north at Annamessex, they would wrong Maryland; if south at Pocomoke, they would wrong Virginia; they therefore took for their initial point the north headland of Little Annamessex, on what is now called Jane's Island, midway, exactly, between Annamessex and Pocomoke bays. And here it must be noted that they *then*, Calvert as well as Scarbrough, *did not call the Pocomoke the Wighco.* Calvert is presumed to have known it was a misnomer by Smith, and that the true Wighco was north. They called the river, the north shore of which was the southern bounds of Watkins' Point, Pocomoke; and they knew that the Wighco was north of Annamessex bay, whose southern shore was the north bounds of Watkins' Point. They were ordered and bound to run "*a right line.*" They *did*, by running, as they reported, an "east line," and were wonderfully accurate, for the times and instruments, in not varying from an east line but 15 minutes over what Virginia, by law, allowed in her surveys, 5°—Calvert and Scarbrough

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varied but 5° 15′ from due east, (Michler's Report and Henning's Stats. at Large,) and they stated expressly that they had run the line "FROM" Watkins' Point, and they specified the *part* of the point from which they had run it, viz: "the extremest part of the westernmost angle of the same." And they further report that they run this line—not up nor on the shores of the Pocomoke *river* or *sound*—but "OVER" Pocomoke River. This word is not "along," to run lengthwise, nor "*across*," to run from side to side merely, but it is stronger, and expresses more than either. The line did not run "*along*" the right bank of the river, and at a certain point run "across" the river, but it was run "*over*" the river, signifying that, in this instance, it was moving *from* the west and *over* the river to a place beyond the left or east bank of the river, near Robert Holston's. To pass *over* a river is to pass over both banks as well as the water. Its root signifies motion, *arriving at* and *departing from*, and *to pass across and beyond*, whether above or on the surface, it always imports *excess*.

But there is a better test of the meaning of the Commissioners than mere words. If they had started at Cedar Straits, if that was their initial point, nowhere would "*a right line run east from it have touched the Pocomoke River.*" It would have intersected the open Pocomoke *bay* or *sound* from three to five miles *below the mouth of the river*, and would not have been over *the river* at all. Again—it was run expressly to a place near Robert Holston's, on the east bank of the river. Now, even granting the Pocomoke Bay was meant for river, then another test more trying still obstructs the claim of Maryland. How came the place on the east side of the river, near Robert Holston's, to be so far north of a right line run east from Cedar Straits? That place, now easily identified, lies nearly northeast from Cedar Straits. This proves mathematically that if these Commissioners ran the part of a right line east to near Robert Holston's house, they could never have started at or anywhere near to Cedar Straits. On the contrary, they expressly say

that they run an east line from Watkins' Point "agreeable with the extremest part of the westernmost angle" thereof. They could not run it from the whole, each and every part of Watkins' Point, for that would have run the broadest line ever known to the God Terminus between provinces. They agreed upon the midway westernmost angle of the point, and from "*the point*" *agreeable with that part of it*, i. e. *from* that extremest *part* of the westernmost angle of Watkins' Point, they ran an *east* line "*over* the Pocomoke River" to the ocean-sea, &c. They expressed this distinctly, not only the *part of Watkins' Point* "FROM" which they run, but the *part of Pocomoke River* "TO" which they ran, viz: to the land near Robert Holston's. And *there they had* "*marked certain trees.*" They don't report that they there commenced to mark trees for the first time on the line, but that there especially they were particular to "mark certain trees," because it was there that the line "was run over *Pocomoke* River." They were particular there not only to "*mark certain trees*," but to name the land where it was —near Robert Holston's. No preceding word or phrase negatives or asserts the fact that they did or did not mark other trees before arriving at the Pocomoke River; but the subsequent language, "which are so continued," implies that the whole line was *continuously* marked by trees or otherwise. We have already shown a reason why, if marked, the marks were not preserved or were purposely destroyed; the want of "processioning," or renewal of marks at regular intervals of years, for want of "neighbors" loyal to Virginia, and owing to the aversion of the refugees from Virginia, settled there, to be subject to Virginia's laws of persecution and intolerance. But however that may be, this part of the line has not been searched for marks by the present Commissioners; let it be admitted, for argument, that they *marked no trees* on that part of it, yet does that prove that there were no *other* marks of something else besides trees there? Was not the extremest part of the westernmost angle of Watkins' Point itself a *mark*, a headland to begin

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with, more permanent and perdurable than marks or trees? Suppose there was not a mark between that and the "certain trees" marked near Robert Holston's, would that invalidate the line or render its course uncertain even? Calvert and Scarbrough say the "certain *trees*, which are so continued," &c., not meaning the *trees* they there marked were continued, but their marking of the trees was so continued to the sea-side. Will not the line continued to be marked to the sea-side show the course of the line west as well as east of the Pocomoke River? It does show its course west, and that is *direct* to the "extremest part of the westernmost angle of Watkins' Point." But there was no necessity, and it was then and is now very inconvenient to mark from the angle to where the line crosses the Pocomoke River. The distance is only fifteen miles, and the line, nearly its whole course, passes over an immense body of mink and musk-rat marshes.

The whole area south of the line west of Pocomoke River down to the Pocomoke Bay and River, and west to the Tangier Sound and Cedar Straits, is but about 32 square miles; 8 only of which is forest or arable land, and the remaining portion, 24 square miles, is marsh. Its extreme breadth is between the initial point of the survey and Cedar Straits, and the shore of Pocomoke Sound running northeasterly from Cedar Straits. The strip between the line and the sound narrows as you approach the mouth of the river to an average width of not more than one mile and a half. The estuaries at the mouths of East Creek and Manoniece Creek make up north to the line, and that of Ape's Hole Creek runs up in half a mile of it. It is very doubtful whether there were at that day many, if any, obstructions to the line of sight for a survey; the whole distance there are but few now as compared with any other line of the same extent. From the westernmost angle to James Tuft's house at Somers' Cove near Crisfield, is a distance of clear sight for three miles. Then commences some pine forests of secondary growth, that according to the topographical marks of De La Camp's

survey of the line continuous for about two miles, and thence to Manenusco Creek for six or seven miles the line is over marsh, and then begin the swamps of Pocomoke for about 4 miles. There are not five miles of distance on part of the line which can't now be run by the longest sights with the naked eye. Having the headland of Little Annamessex for a natural object to start by and sight an east course by, there was no difficulty then, and there is none now, in running the line without a mark. The westernmost angle of Watkins' Point and the crossing of the line over Pocomoke River could always easily, by long sights, determine where marks and monuments could be placed when required. Whether this part was marked or not, except at the two termini, *there they, at least, were fixed;* and if marks were not placed there, there were marks placed on Smith's Island corresponding to this line deflected south of west at the angle of Watkins' Point towards Smith's Point under Lord Baltimore's grant, and afterwards deflected north of west under Lord Hopton's grant to Point Lookout. The first line cut the south end, and the last the north end of Smith's Island nearly through or at its great thoroughfare. See Michler's and De La Camp's Surveys, and the depositions on the subject of the stones and stumps and other marks, at Barnes' Point near Troy Island, in the thoroughfare, on Cow Ridge and on the Piteraft Patent and at Drum Point. The line was never actually run across the bay. Lord Hopton had no grant on the eastern shore, but when the grant to him was confirmed to Virginia jurisdiction, that State of course claimed that the line closed at Watkins' Point from Point Lookout, instead of from Smith's Point. This accounts for two lines, one at each end of Smith's Island and the marks there, and for the confusion of traditions about them. But Maryland cannot deny or dispute that Lord Baltimore's and Virginia's patents were both required to make Henry Smith's title to Piteraft on that island complete for the whole and respective portions of that tract patented. This is sufficient to show that there was a divisional line on Smith's Island, and if so,

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how could any line be drawn from Smith's Point to Cedar Straits and cut Smith's Island? Drawn to the westernmost angle at Janes' Island it cuts it south of Horse Hummock, and leaves all of Shanks' and a large portion of Hog Neck in Virginia; drawn to Cedar Straits it leaves all of Smith's Island north in Maryland. An inspection of this diagram on the map of coast survey will reduce the problem to one of Euclid. Virginia has always claimed and possessed the southern end of Smith's Island—that is not denied—it is north and west of Cedar Straits, and Smith's Point is south of both Smith's Island and Cedar Straits; how then could a *right line* across the bay be drawn from Smith's Point to Cedar Straits and cut any portion of Smith's Island. The problem would puzzle all geodesy. Smith's Island was part of the eastern shore, and was divided in no other way than by the imaginary closing line from Smith's Point or Point Lookout to the westernmost angle of Watkins' Point. It was so divided by both of those imaginary lines, and at the south end the Royal or States jurisdiction was never denied, but mutually admitted by patents for the respective parts of the same tract of land which were in the respective colonies to the same patentee at the same time. Virginia granted her part and Maryland her part of Pitcraft to Henry Smith, assee of Stevens. (See copies of deeds) There being a divisional line there then, it must be plain that the initial and closing point of Lord Baltimore's grant was north, and considerably north of Cedar Straits. They reported further that they had continued the east line over Swan-sea cute (meaning Swanseagut) Creek into the marsh of the sea-side. And here it might as well be claimed that they ran *up* or *down* or *along* Swanseagut, by a crooked line when they reported an east, a straight, a right line, run *over* Swanseagut Creek as they had reported it run *over* "Pocomoke River." All this was done "with apparent marks and boundaries."—Not one in most lines between States or provinces was ever more clearly and plainly marked. The marks and boundaries are still apparent. "Lieutenant Mishler's report to the Commissioners, Dec. 20th, 1859, says:

"Some of the marks consist of old blazed trees, such as oak, hickory, gum, cherry, persimmon, mulberry and sycamore. Other marks of the line are to be found either in country roads or lanes, or in divisional fences of neighboring farms, or in gates, or sometimes in houses, known and admitted to be such by all persons, irrespective of State, the localities being handed down from one generation to another. Along the whole length of the line from Chincoteague to the Pocomoke River, a distance of between twelve and thirteen miles, there were existing of such marks, at the time of the survey, thirty-three trees, one gate, the site of the ruins of an old house, standing at the time the Scarbrough line was run, two State roads, located on the line, making in all, an average of one mark for every half mile.

* * "These marks, when laid down on the maps, were found to be nearly in the same straight line, *the general direction furnished the course.* Two only of those marks are at any distance from straight line, and these not more than 350 feet. The aymutte or direction of the line, 5° 15′ N. of E., and the line between Chincoteague Bay and Pocomoke River, when prolonged across the latter river, and along and near the N. shore of Pocomoke Bay to Tangier Sound * * reaches the Sound *at the westernmost point of Jane's Island, about 500 feet south of the Coast Survey Signal, planted on this island. No* boundary marks of any kind were found west of the Pocomoke River." '*And they mutually agreed that this line, thus beginning and running and marked continuously from the bay to the sea-side was to be received as the bounds of Virginia and Maryland on the eastern shore of the Chesapeake Bay.* Thus, wherever beginning, and however running or run over land and rivers, and creeks and bays, marked or not marked from natural objects to natural objects, over Pocomoke and over Swansegut Creek to the sea, a straight line "*was to be received as the bounds of Virginia on the E. shore,*" *and it was so received by both provinces.*

This agreement was signed and sealed and approved, and cannot be revoked or modified without the consent of both

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parties. Whatever may be the issues respecting the Potomac boundary, there can be but one issue respecting the boundary on the eastern shore—*an issue of fact*—was this *line run as described and mutually agreed upon?* The whole case may be rested on that issue. But Virginia is desirous of presenting the original fairness of the adjustment. We have already shown that in reference to the shape and size of Watkins' Point as a tongue of land *from* which to run a line, it made an almost exact division of it to begin at the extremest part of the westernmost angle of it, and to run an east line to the ocean, with a variation of about 5° 15′ N. That point is exactly under the 38th parallel of N. latitude. That parallel was the line of Maryland on the eastern shore. These Commissioners were not to run any line but from that point to the main ocean. They had nothing to do with the Potomac line or the closing line across the Chesapeake—but they had to look to two criteria to determine the line accurately: first, to Watkins' Point—second, to the 38th parallel of latitude. They did both with remarkable precision and justice to both provinces. They took the north headland of Little Annamessex, which divided Watkins' Point. But the part they took for the initial point of their survey was about two miles south of the 38th parallel; the variation of the needle in 1668 is estimated 4° 54′; West Virginia allowed by law, in her surveys, about 5° variation. Disregarding the variation at that date, it may be said that the surveyor's compass itself observed both the criteria of an almost exact division both of Watkins' Point and of the 38th line of latitude on the plane of the eastern shore.

Calvert and Scarbrough tell us they began at the extremest part of the westernmost angle of Watkins' Point, and ran the line over the Pocomoke River and over Swansegut Creek to the marsh on the sea-side. Now, one has but to look to the maps prepared by Michler and John De La Camp, under the direction of the then Commissioners, McDonald and Lee, in the year 1860, to see that the line of

Calvert and Scarbrough, after passing east over the Pocomoke river, cuts the parallel of 38° N. latitude almost exactly in the middle of the boundary line; runs across Swanseagut a mile or more north of 38th parallel, and terminates on the sea-shore about 1¼ miles north of the same. Thus the 38th degree being the exactly true line, by observing the westernmost angle of Watkins' Point and Swanseagut Creek, they divided the plane of the peninsula as equally by the diagonal line as by the parallell itself. What Maryland gained in the angle south of 38° on the western side, Virginia was compensated for by the angle gained by her on the Eastern side of the Peninsula. The Calvert and Scarbrough line cuts the 38th degree near Wagram, about 4 miles or more east of the Pocomoke River. Maryland gained rather the largest angle, but whether it was equal or not it *was received and adopted by both provinces as the line on the eastern shore*, and has been the legal, if not respected, line for upwards of two centuries. The lands of the late John U. Dennis, one of the most intelligent and respectable gentlemen of Maryland, who lived and died near where the Calvert and Scarbrough line crosses the Pocomoke River, always paid land taxes partly in Maryland and partly in Virginia, and the present Judge Franklin, now living on the Eastern Shore of Maryland, now pays land tax partly in Maryland and partly in Virginia, on a large tract at Troy or Long Point, on the shore of Chincoteague Bay, east of Swanseagut, at the northeast corner of Accomack, on the main. The line was straight from the Franklin to the Dennis farm—from Long or Troy Point to the crossing of the line over Pocomoke River—when? how? by what agreement or survey? By whom was it ever made a crooked line between that river and the westernmost angle of Watkins' Point, to which, from that river, it points straight as an arrow now? Certainly Virginia has never consented to modification or change of the line on the eastern shore since 1668. How, then, is it that Maryland pretends that it ran by the river?

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This crook in the line the Commissioners of Maryland have endeavored to make out of the words "agreeably," &c., in the report of Calvert and Scarbrough. The distortion is expressed in the report of Thomas J. Lee, Sept. 19th, 1860, to Governor Hicks of Maryland, page 17. He says:

"That these Commissioners (Calvert and Scarbrough) were qualified to fix the bounds of Maryland and Virginia upon a necessity for so doing, and fixed and established the *whole boundary* across the Peninsula or Chersonese, by a marked line between the Pocomoke and the marsh on the sea-side, run east by compass, *agreeable with, not from*, but in the direction of the extremest part of the westernmost angle of Watkins' Point."

It is enough to say, for the argument, but not enough to say for the reproach of this plain perversion of language and of fact, that it contradicts the charter of Lord Baltimore, the instructions of both Provinces to Calvert and Scarbrough, and their express report to the contrary. The charter makes Watkins' Point the initial and closing point of the whole boundaries of Maryland. Now, if this idea of Mr. Lee means anything but to crook a straight line, it means to argue or claim that the line was run *from the Pocomoke River* to the shore of the *ocean*, "agreeably with the extremest part of the westernmost angle of Watkins' Point," pointing to it and on a line with it, but that then Calvert and Scarbrough returned to the Pocomoke River, where the line ran "over it," and instead of allowing the line to run over the river, ran to the middle of the river, and not *over* it, but down it to Cedar Straits, and thence to Smith's Point. If that is true, then the line never ran from or to the extremest part of the westernmost angle of Watkins' Point at all. It makes one impatient in asking whether the charter did not require *a right line* to be run *thence* to the ocean? Whether Watkins' Point was not identified by Calvert and Scarbrough as laid down on Smith's map? Whether a line could be run from the whole point? Whether the

extremest part of the westernmost angle of that point was not agreed upon as the part "agreeable with which the line was to be run?" Whether the Commissioners of '68 don't expressly report that they run the line *from* that *part* east, over the Pocomoke River and Swanseagut Creek, to the marsh of the sea? And whether the line of the Pocomoke River would be agreeable with such a point, or part of a point, on an east line across the peninsula, running the course of the line east of the Pocomoke? Was ever an initial point so treated by a survey as never to touch it after starting from it? This is really the only pretension of the present Commissioners for contradicting the express report of Calvert and Scarbrough

We are willing to rest the whole issue upon the test whether they started at the said part of said angle of Watkins' Point and ran the line straight, or right, or east, to the ocean. There is nothing to warrant this pretense of Maryland. It is a pure invention, not only without authority or ground, but pointedly in contradiction of the facts reported by Calvert and Scarbrough. The only meaning of the phrase "agreeably," &c., is that the line was run conformably with the extremest part of the westernmost angle of Watkins' Point, and not with any other part of that point. With that part of that point was the line agreeable, and with none other. At page 12 of his same report Mr. Lee inculcated the same idea by saying: "The boundary they (Calvert and Scarbrough) established by marking certain trees, began over Pocomoke River, on the land near Robert Holston's, and was continued by marked trees, on what they deemed an east line, to the sea-side."

The boundary they established "began," not over Pocomoke River, but it was run *from* the extremest part of the westernmost angle of Watkins' Point, over Pocomoke River as well as over Swanseagut Creek, to the sea. Another error of Mr. Lee is, (same page 17): "That they neither marked nor established a line of boundary across *any part*

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of what is now Somerset County, Maryland." This is an error equally gross. Somerset County, Maryland, was established in 1666, the 22d August, two years *before* this line was run by Calvert and Scarbrough in 1668. On the south it was bounded by a line from Watkins' Point east to the ocean; east by the ocean; north by Nanticoke River and Sound, and west by the Chesapeake. Now this shows how Somerset County came to incroach on the point at Cedar Straits. Maryland then claimed that her limits extended south to Cedar Straits. If that was the initial point of the line between the two provinces, then a county of Maryland could be laid off that far south; and suppose it was, why, then, Mr. Lee was right. But its southern boundary line was no more definite than the whole body of the land of Watkins' Point. But the line of the two provinces was afterwards, in 1668, fixed and established, beginning at the extremest part of the westernmost angle of Watkins' Point, at the headland of Little Annamessex, midway between Big Annamessex and Pocomoke bays, and was run east over Pocomoke River. Was this not marking by an initial point on Watkins' Point, and by a marked place of crossing Pocomoke River, a line of boundary across a part of what is now Somerset County, Maryland, if Somerset had, before then, been laid off as low as Cedar Straits?

Mr. Lee says, "that they marked and established the present divisional line between Worcester County, Maryland, and Accomack County, Virginia." The truth is, that Calvert and Scarbrough never did mark any line between Worcester and Accomack counties, but they ran the line which is now the divisional line between these two counties, not as between them as counties, but as between the two provinces of Maryland and Virginia. Was Worcester laid off *before* or *after* Somerset? If before, how came the Somerset southern line to run up the river Pocomoke, instead of east or by a right line to the ocean, to the point of the southwestern corner of Worcester, to the point near the land of Robert Holston? If afterwards, why still did it not run east to the

ocean by right line? Lee says the line was intended to be an east line—the charter says that it should be a "right line" to the ocean. Calvert and Scarbrough tell us where they began and how they ran the line; and yet this Commissioner, without data, without any evidence whatever of any other line than that of Calvert and Scarbrough ever having been run by anybody, at any time, bluntly says,—"They (Calvert and Scarbrough) established the boundary between the two colonies east of the Chesapeake *precisely* as it now exists, and 'they' (Calvert and Scarbrough, or Maryland and Virginia?) designed that the southern limits of Maryland should extend to Pocomoke Bay." It is only a proof that a respectable topographer was not as familiar with charters, and deeds, and evidences of title, and the laws which govern their construction, and the bounds of provinces, as he was with the quadrant or theodolite. He speaks of a boundary "as it now exists." What boundary? None other existed but that established and fixed by Calvert and Scarbrough in 1668. For a line bound to *begin* at some part of Watkins' Point, bound to be a right line to the ocean from that point, which was begun at a specified point, which was run east to the marshes of the sea by a continuous course from the initial point *over* Pocomoke River and over *Swanseagut* Creek, which Maryland and he both admit binds Worcester, one of her counties, he arbitrarily asserts and reports another line, beginning at another place, running not a right line or east line, following the meanderings of the Pocomoke River, not over it, to where he says the Calvert and Scarbrough line began, in the face of what they reported, and in the face of the charter of Lord Baltimore itself, and this he avers to be the line "precisely as it now exists."

Did it never occur to him to inquire why, if the Calvert and Scarbrough line binds *Worcester* County, in Maryland, it does not bind Somerset County, in Maryland, too. That line never did cut Somerset County, Maryland, in one sense, for it only divided it from Virginia. The part south of it

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was Virginia, and not Somerset County, Maryland. But if Calvert and Scarbrough did not begin and run an east line, or right line, as they describe, where did they begin and run it? They ran one, and but one line. Maryland has never named or shown any other, except as claimed by this report of Mr. Commissioner Lee. Even he admits it was intended to be an east line, but even he could never suppose that any one could have *intended* the line he claims from Cedar Straits up the Pocomoke River, to near Robert Holston's, to be an east or a right line, because the moment he got to near Robt. Holston's he found, whoever run the line east of the Pocomoke could run an east or a straight line, if they *intended to do so*, and they certainly, on his theory, had not done so, and as the charter required, before they reached near Robt. Holston's, would his line be "agreeable with the extremest part of the westernmost angle of Watkins' Point?"

But besides the argument of "agreeable with," Maryland advances another argument, called "*washing away*." Watkins' Point was laid down and named by Smith. There it is now, in the same shape of headland and coast, remarkably the same, and the headland of Little Annamessex is still there the westernmost angle, and there still is the point of main marsh land at Cedar Straits, and there are the Fox Islands, so strikingly described by the County Court of Accomack, in 1663, as a "*spiral point*"—so called because of broken thoroughfares of the Fox Islands at its end. Those islands were there then, as now, as Smith's map shows. To get over this, Maryland has resorted to "traditions." Can traditions rebut the recorded articles between Calvert and Scarbrough? Can all the washings of the Chesapeake Bay, if the north headland of the Little Annamessex was not now still the westernmost angle of Watkins' Point, could that rebut the mathematical certainty which can show where it was? Did not Michler's survey find it ad punctum? But the traditions prove where it was: see prior reports and the depositions taken by this Commission. One of the present Commissioners on the part of Virginia (Mr. Wise) in 1833

began to represent the Accomack Congressional District of Virginia in the House of Representatives of the United States. Certainly a considerable part of the southern end of Smith's Island was considered by all the people living on it as in Virginia, and the people on that end voted in Virginia. John Marshall, living then and now on Shank's part of Smith's Island, always voted for Mr. Wise, and there were others. Later, Mr. Jones, one of the Commissioners on the part of Maryland, represented the Somerset District of Maryland in the House of Representatives of the Congress of the United States, and he was for several years cotemporary there with Mr. Wise. Every two years, whilst they were there together, their elections came on—did John Marshall, and others on the south end of Smith's Island, ever vote for Mr. Jones? If not, it was because they, and their fathers before them, were deemed and had ever been deemed in Virginia territory. Can Mr. Jones show how that came to pass, if the line on the eastern shore began at Cedar Straits, and was at the same time *a right line* across the bay to Cedar Straits *from Smith's Point?* A right line from Point Lookout to Cedar Straits *would cut Smith's Island;* but no such line was ever run, and could'nt be, under Lord Baltimore's charter, and was'nt required to be under Lord Hoptou's grant, he being granted nothing on the eastern shore.

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Now, these are exceedingly strange facts, when contrasted with such traditions as those of "King Nelson," and those of living witnesses, who pretend to have heard, "once upon a time," from old people, long dead, that the main land, at Cedar Straits, once made main land with Fox's Islands, and Fox's Islands with Watts' Islands south, which must have been long before John Smith's Survey in 1608, and long before his maps in 1629, which lays down the Strait now called Cedar, and the Fox and Watts' Islands, just as they are now. The fact is, that such speculations on physical geography, founded on such washy traditions, and the mistaken proclamation of Governor Harvey, and the clamors of

Quakers of Annamessex in 1663, and the fact that Smith erred in laying down the 38th parallel so far south, were once the only pretexts for claiming as far south as Onancock. See Smith's map, Scarbrough's report, the Proclamation of Governor Harvey, and the depositions taken before this Commission. But all that pretension was ended by the settlement, fully and finally made by Calvert and Scarbrough in 1668. Lee, even, admits "that agreement between those Commissioners was accepted as final by the crown and the Lord Proprietor of the province," and "that they declared this line (by Calvert and Scarbrough) *to be the bounds of Maryland and Virginia upon the eastern shore of Virginia.*" What more, then, is required, but to re-mark it permanently?

If arguments of inference are still to delay the execution of this Agreement, capable of being reduced to mathematical demonstration, there are abundant sources of inference, sound and clear, in favor of what Virginia claims. For example, there were two classes of bays and rivers, the jurisdiction of which the two provinces and States have had to regulate by compact or concurring laws—a river, the Potomac, was concurrent or co-terminous with the line of the provinces, whether it was on the right or left bank or in the channel. The Chesapeake Bay was not co-terminous or concurrent with that line, like the Potomac, but the line of the provinces cut it transversely. Now, compacts were made and concurrent laws were passed by both Virginia and Maryland, in respect to the building of light houses, establishing buoys, forts, ferries, wharves, &c., &c., and pilotage. It would be very tedious to encumber this report with an analysis of all or any of the old laws, to show the *contrast* of those joint regulations pertaining to the waters which were *cut across*, or transversely, by the divisional line of the two provinces. Was the Pocomoke provided for like as the Chesapeake Bay or the Potomac? In every case like as the Chesapeake Bay. Act 9, of 1663, shows that the King of Potomac's lands were all sold and proceeds appropriated

by Virginia. Act 1, 1667, relates to a tax of two shillings per hogshead on tobacco, &c., for relief of inhabitants "*on Potomac River.*"

Act 1, 1679, relates to stores and garrison against Indians at the head of Potomac, at a place called Niapsco. See Purvis' Collection, &c., London edition of 1682.

All the laws touching the Potomac, on every subject, apply all along the shores or channel, from head to mouth. But the laws providing for the proportionate joint expense of light houses and buoys, &c., where one province held the head and the other the mouth of the waters, were very different. Maryland, from her charter, held the head of the Chesapeake Bay and the head of the Pocomoke River, and Virginia, after as well as before the grant to Lord Baltimore, held the mouth of each. It was for that reason that the regulations touching the Pocomoke River were assimilated to those touching the Chesapeake Bay and not to those of the Potomac. But this line of argument is a waste of labor, when we have the positive and indisputable line agreed to by Calvert and Scarbrough, and fixed forever by the two provinces in 1668. But not only did Calvert and Scarbrough and the two colonies fix and establish this line, but they settled and adjusted the rule by which every question of claim or right, dependent upon the line, should be determined. Lord Baltimore, as we have seen, hurried and encouraged the issue of patents by Elzey and others from '62, '63 up to 1668; and Virginia had granted patents up to Bokotonock, on the Sinepuxent Bay, on the sea-coast. Maryland had been creeping southward on the bay and Virginia northward on the sea-side. When the line was fixed, the rule was settled to govern these conflicting patents too. See the Imprimis of the Articles of Agreement. All the patents of Virginia on the seaboard were saved in their titles. Again: all patents of Virginia, elsewhere on the Maryland side of the line of lands, *not also patented in Maryland*, were saved as in the first class. Again: all patentees of Virginia, *who had also seated them* in Maryland, *though already*

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patented in Maryland, but not seated, should enjoy the same, unless they were proved to have seated them in defiance and despite of the Governor of Maryland, after warning given, &c. Again: any patentees of Virginia, in Maryland, for lands for which Maryland had granted patents, should yield to the patentee from Maryland—in all and every case "*paying the half fees to the Surveyor General* (*Scarbrough*) *and full fees to the Secretary and Chancellor*" (*Calvert.*) Here is an example that Commissioners, in old times, were, like those of present times, careful of their own perquisites. Scarbrough got half and Mr. Secretary and Chancellor got full fees, and why the difference is not now known. Certain it is that the patentees of Virginia, in the Maryland territory, as found by the line established, had a much better provision made for them than the patentees of Maryland found to be in the Virginia territory. There was no reciprocity at all. Every patent granted by Maryland south of the line fixed, was left to its invalidaty. Those *granted before* 1668 *were annulled*, and those after that date were void. Such is the fate of every patent adduced now on the part of Maryland. Why was this? Some people in Annamessex always alleged that Scarbrough conjured Calvert by allowing full instead of half fees. The reason was a graver one, and rested on better grounds;—not an intruder from Maryland, south of that line fixed by Calvert and Scarbrough in 1668, either before or after that period, ever seated or settled *east of Pocomoke River*. There were no settlers on that part of the eastern shore line who had ever defied or resisted the Royal Government of Virginia. For the reasons already stated the refugees and non-conformists had all been driven west and north of the Pocomoke River. Thus, from Pocomoke to Manokin, they had settled *in defiance* of the Royal Government and to defeat its jurisdiction. Just as Maryland, in the third article, excepted against such as were seated in her limits under Virginia's patents, so Virginia excepted to all such settlers in Annamessex, in her limits, as all had been seated by patents from Maryland, in defiance

of the Royal Government. All these lands had been so patented and seated; there were none anywhere else to be provided for, and those there were, therefore, excluded from this saving of titles. Nobody wanted their lands south of the line then, though some are valuable now, and the titles, by mere omission and dereliction, have never been disturbed. Now they will be in a tantalus condition if given to Maryland. They will be seated on the Tangier and Pocomoke Sounds, with oyster rocks, which are their meat and bread, at their doors and will be excluded from taking any in Virginia waters. If Virginia takes them within her limits, they can live and thrive, and their lands increase in value.

X.

After Lord Baltimore settled his boundary with the colony on the Eastern Shore of the Chesapeake Bay, he had a controversy with Wm. Penn about the boundary of his northern limits. He claimed the colony of Delaware, and the line of 40° north latitude. The grant to Penn is described in the King's letter to Lord Baltimore, April 2d, 1681. See De Jarnette Papers, No. 113.

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The contest between Penn and Lord Baltimore, was one between a Court Quaker and a Cavalier Catholic. The latter was much the most honest gentleman. From London, 16th September, 1681, he warned settlers whom he claimed to be within his grant of three degrees N. latitude, not to pay any more taxes, or "sessments," by or under any laws of Maryland. He coaxed them wooingly, yet warned them of his power with his superiors in London. This letter was partly addressed to *Augustine Herman*, Lord Baltimore's map maker. See De Jarnette Papers, No. 114. On the 19th August, 1682, the King ordered Lord Baltimore at once to proceed to "set forth and ascertain the boundaries between Maryland and Pennsylvania," and says: "that the boundaries of Maryland and Pennsylvania cannot, by any method, be so certainly effected as by an admeasure-

ment of *the two degrees north from Watkins' Point, the express south bounds in your Patent, and already settled by Commissioners between Virginia and Maryland.*" Here is the King's attestation of two facts: first, *that Lord Baltimore was granted but two degrees;* and in saying "the express south bounds in your patent," the meaning is not that "*two degrees*" were expressed, but that *Watkins' Point* was expressed; and second, that being *already settled by Commissioners*, the latitude was then fixed and known to be two degrees from the 40th parallel; Watkins' Point fixed the degree, its latitude being known. If the latitude of Watkins' Point was not known to Smith in 1629, it must have been known later in 1682, for then the Observatory at East Greenwich had been established eight years under Flamsteed. Again—in the same paper the King said:—"We have thought fit to recommend the same in a most particular manner to you, willing and requiring you that, with all possible speed, upon the receipt hereof, you proceed to determine the northern bounds of your Province as the same borders on Pensilvania, *by an admeasurement* of the *two degrees* granted in your Patent, *according to the usual computation of sixty English miles to a degree*, beginning at the south bounds of Maryland, *according as the same are already settled* by Commissioners, as is above mentioned," &c. Thus Lord Baltimore was, in effect, ordered to begin his measurement on his south bounds, as already settled by Calvert and Scarbrough, the only Commissioners ever then appointed, who did settle them at Watkins' Point, with its initial at its westernmost angle. If degrees were not named in Baltimore's patent, Watkins' Point was, and was found exactly on the 38th parallel. Lord Baltimore had then but to measure 120 miles north from Watkins' Point and he would reach his north boundary on the 40th parallel. But it matters not what its latitude was, this is proof that it was settled, both that Watkins' Point was ascertained and fixed and that Lord Baltimore's southern boundary line was settled, and we have asked in vain again and again, when did

it become unsettled? And it must be observed that this order came just fourteen years only after the Calvert and Scarbrough survey, when all the facts were fresh in the records of England and the Colonies. See De Jarnette Papers, No. 117. But we have positive evidence, that Lord Baltimore himself has left to the State records, that he acknowledged and acquiesced in the Calvert and Scarbrough line. He has left his own account of "A Conference held between the Right Hon'ble, the Lord Baltimore, Pro. of Maryland, and William Pen, Esq'r, Proprietary of Pensilvania, at the house of Col. Thomas Tailler, on the Ridge, in Ann Arrundell County, the 13th of Dec'r, 1682." See De Jarnette Papers, No. 118. With a short preface he gives their colloquy. He describes Penn's "florid manner." It was "oily," it is true; he would do all to be "a good neighbor." He then produces a letter from the King, (that just quoted.) On reading it, Lord Baltimore complained of some misinformation, and produced his patents and a transcript of Penn's patents, and then describes himself as saying: "I have, for my *northern* bounds, the *fortieth degree* of north latitude, which, by *your* patent, is your *southern* bounds, as Watkins' Point is mine." Did he then, and when he noted what was said then, not know where Watkins' Point was, and where the identical part of it was where his southern bound began? Nothing is left to doubt about the answer to that question; for, fortunately, he had the correctness of his statement of this conference certified and appended to it, *and the first* name of six persons, who signed the certificate, is that of *"Philip Calvert"—his nephew, his Chancellor, his Commissionor*, with Scarbrough, in 1668. Lord Baltimore certifies the true copy himself found in the State Paper Office of England, "Colonial" Maryland, vol. 43, pp. 149, 153.

Here, then, when with this letter of the King, twice reminding him that his southern boundary *was settled by Commissioners* at Watkins' Point, and when he said "Watkins' Point is my southern boundary," he could have said noth-

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ing else, in the presence of Philip Calvert, but what he did say and admit—and in speaking of Watkins' Point thus, he cannot be understood as meaning any other point and part of the point than that which had been identified by Philip Calvert and Edmund Scarbrough.

In reply, Penn reminded him he had but two degrees of latitude; he did not deny it. See p. 2. And then the wily Quaker tempted him to start further south at 37° 5'. He (*Penn*) *would take where Baltimore ended.* This puzzled Lord Baltimore, but he was not to be trapped, and he would consider, but Mr. Penn must run line of 40th degree first. Penn then proposed for him to begin *at the Capes of the Chesapeake*, which, he said, was in 37° 5' N. latitude. The cunning Shad had no scruples to conspire against Virginia's right of territory, and to tempt Lord Baltimore to try and take it. Lord Baltimore, though, knew that the lower he ran south, the narrower would be his territory north. He *then* drew back from being pressed southward down the eastern shore peninsula. Penn wanted the outlet of the Susquehanna River. Lord Baltimore repeated that he claimed the 40th parallel to be taken by a sextant of 6 or 7 feet radius. Penn then offered to lay aside the King's letter, if Lord Baltimore would begin his south line at 37° 50', instead of 38°. Lord Baltimore bluffed his proposal by asking Penn whether he had purchased the Duke of York's pretensions to Delaware? Penn: "upon terms," but "wanted to proceed first to the bounds between him and Lord Baltimore." Lord Baltimore still stuck to 40° north latitude, "which to find," said Penn, "I propose to begin at the capes and run two degrees." To that, Lord Baltimore replied: "*My southern bounds being Watkins' Point, was so determined by Commissioners from his Majestie and others from my father; now had they sett out Watkins' Point higher up the bay, my father must have been contented then with, and the northern bounds being the 40th degree of northern latitude, beyond which I am not to run.*"

Here is the full admission that the Watkins' Point line

was fixed, by whom fixed, and that he was bound by it "Sett out higher up, or lower down, his father and he had to be contented therewith." Could anything be more definitely expressed than this? Penn again and again repeated his proposal of the Capes, and as often Lord Baltimore recurred to the 40th degree and the 7 foot sextant. Lord Baltimore again recurred to Delaware and asked, "on what do you claim?" Penn begged to conclude first discourse. Lord Baltimore persisted in his charter. Penn poked at him the Capes again. Lord Baltimore demanded 40°, no sea-quadrant, but a seven foot sextant. Penn proposed arbitrators; then arose a jar about a Capt. Connaway, and misreports, and some suspicions of foul play about maps, &c. Lord Baltimore held to his patent and appealed to the sunn to show where the 40th degree N. latitude was. Penn wanted to go the Capes again. Lord Baltimore told him he might, for his own satisfaction. Penn then became soft —whispered *a wish* "*between ourselves.*" Lord Baltimore "only first premised that an observation be duly taken, to answer the King's commands." Penn then nudged, it seems, closer up—he must have whispered low when he said: "I question not but if the Lord Baltimore *would vouchsafe* to discourse the business in *private* with me, we should *fairly accommodate all matters.*

We are not left to conjecture what "to *discourse* the business in private" meant. No. 119 of the De Jarnette Papers explains all. In a letter of 11th June, 1683, dated at Patuxent, Lord Baltimore says: "Having lately had the long desired second conference with my neighbor, Mr. William Penn, I send you the same." And he prayed to be heard in person versus Penn. He would embarque for England in April, 1684, to make good his claim to Delaware. The written conference was headed: "The sum and substance of what was argued and spoken by Charles Lord Baltimore, and William Penn, Esq'r, at their private conference at New Castle, on Delaware River, Tuesday, the 29th May, 1683." When they met that day, then, Lord Balti-

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more desired to know of Mr. Penn what proposals he had to make about their bounds. Penn answered, that he would'nt insist on his Majesty's letter of 29th August, about the two degrees of latitude. But there was an admeasurement still to be insisted on. That seemed strange to Lord Baltimore. Penn, "not without some heat," explained what he meant by another admeasurement; it was this: take an observation at Watkins' Point, ascertain its latitude; thence to measure to the 40th degree; saying, "that out of every degree he did'nt doubt but to gain six or seven miles, and by that means to gett water at the head of Chesapeake Bay, and that this was the mistery," &c., &c. He would procure it from his Majesty. Lord Baltimore replied, he doubted whether he could so impose on his Majesty and the Council; spoke of Watkins' Point *as his south bounds* after he had fixed it, and could'nt see why his north bounds, as well as south, could'nt be measured. He spoke also of Penn's grant *by degrees*, and said, "I had nothing given me *by any number of degrees*, but *only* Watkins Point for my *south bounds*." He objected further, when Penn intimated another proposal. He offered to bribe Lord Baltimore for the inlet of the Susquehanna and some land. Lord Baltimore could'nt assent without admeasurement of his northern bounds. Penn then inquired about the latitude of Palmer's Island, in the Susquehanna River. It was 16 miles south of the 40th degree, 12 miles from Newcastle. Penn then asked the price. Lord Baltimore wanted time, but Penn would give him but a day. They could not agree, and parted.

This convicts Penn of trying to buy Lord Baltimore to lay his claims on Virginia territory. He would not, and did not, but abided by Watkins' Point and his southern bounds, "already settled by Commissioners." This was to his honor. By whom, when, how, for what reason, was Chas. Baltimore's decision and observance of good faith broken? The ground of doubting or denying this settlement in 1668 is a mystery. Lord Baltimore struggled strong and bravely, but in vain. After much correspondence, praying to be

heard; after an acrimonious controversy with Markham about the Delaware survey, and incurring displeasure by omitting to proclaim William and Mary, he was deposed from the right of Lord Proprietor, and left merely his rights of individual property. See his letters to Sir Lyonell Jenkins, June 12th, 1683, No. 120; December 7th, 1683, No. 123, to Blaithwait; No. 124, Dec. 11th, 1683, to Sir Lyonell Jenkins; "memorandum concerning Pensilvania," Feb. 12th, 1684, No. 125; Sir E. Herbert, concerning W. Pen, 30th June, 1684, No. 128, Wm. Markham's answer to the Lord Baltimore, March 17th, 1685, Nos. 130, 131, 132; Penn's Petition, August 18th, 1685, No. 135; Report of the Lords of the Committee for Trade and Foreign Plantations, "upon yt difference between the Lord Baltimore and Mr. Penn," 13th Nov. 1685, No. 135, prescribing oaths of allegiance and supremacy; memorandum concerning Maryland and war with France, 26th April, 1689, No. 139; Declaration of the Inhabitants of Maryland, proclaiming William and Mary, Jan. 7th, 1690, and order of his Majesty thereon, with letter to Maryland, approving the proceedings of inhabitants thereof, and ordering them to secure the government, No. 130; Lord Baltimore's petition to the Lords of the Committee for Trade and Plantations for a hearing, and his Humble Proposals; and Lord Chief Justice Holt's opinion that "the King may, by his Commission, constitute a Governor (of Maryland), whose authority will be legall," petition dated Sept. 1st, 1690, No. 141, and Lyonel Copley, Esq., commissioned Governor; Commission to Lyonel Copley, Esq'r, March 12th, 1691, No. 142; all the numbers here referred to are of the De Jarnette Papers. The reason assigned by Geo. Treby, Attorney General, for seizing Maryland, was: "The nature of the seizure is only to take the Government out of the hands that neglected and endangered it into the King's hands. But the laws and customs and propertyes of the Inhabitants are to be preserved."

This brings us to:—

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XI.

THE DEPOSITION OF LORD BALTIMORE.

He was not restored to his Lord Lieutenancy until 1715, by George I. From 1633 to 1715 the Lord Proprietorship existed, with the exception of some two years, by ouster of the Claiborne rebellion, of eleven years or more, under the Commonwealth and Cromwell, and of twenty-five years from 1790; out of 82 years in all, the Lord Proprietor was *out* 39 years and *in* but 43 years. His territory was curtailed in that time by the decision that Delaware passed to Penn from the Duke of York, and by Penn's settlement about 16 miles south of 40th degree N. latitude. Lord Baltimore never had an unclouded and quiet title until 1715. What then was restored to him? Certainly, Delaware and the part of Pennsylvania taken from him were never restored, and there is no more evidence that any portion of the grant to Lord Hopton, &c., &c., was. Pennsylvania and Delaware and Virginia all continued alike to hold their respective parts of the dismemberments of Lord Baltimore's original territory. He certainly yielded the Northern Neck of Virginia and to the boundary of the Fairfax stone. Why? if he is now entitled to the Potomac River? That was as much in the grant as was the whole neck, and the same claim which drove him to retire to the first fountain of the North Branch of the Potomac, equally constrained him to yield the whole river and its islands. See Laws of Virginia, August, 1736, 10th George II., ch. 13th. "An act for confirming and better securing the Titles to Lands in the Northern Neck, held under the Right Hon'ble Thomas, Lord Fairfax, Baron of Cameron," &c., &c. Hen. Stats. at Large, vol. 5, p. 514.

XII.

But what quieted all titles and bounds more than any preceding events or causes between all the provinces, was the deffinite Treaty of Peace settled between Great Britain and France, at Paris, 10th February, A. D., 1763. The main

ends and objects of that very important treaty were to make peace and to perpetuate it, especially by the fixation and description of boundaries of the various provinces of the respective sovereignties in America. Each power described what they claimed and what they renounced jurisdiction over, and maps were made of their agreed divisions. Fortunately, Mr. De Jarnette procured in England a photograph copy of a section of the English map made under that treaty, "by Eruan Bowen, Geographer to His Majesty, and John Gibson, Engraver." This map contains a number of the articles of the treaty printed on its face. Its title is:— "An accurate map of North America, describing and distinguishing the British and Spanish Dominions on this great Continent: According to the Definitive Treaty, concluded at Paris, 10th February, 1763. Also all the West India Islands belonging to and possessed by the several European Princes and States. The whole laid down according to the latest and most authentick Improvements." And on its face it is inscribed:—

"The Limits of His Majesty's several Provinces are here laid down *as they at present exercise their* jurisdictions. But the limits of the Massachusetts Province with New York, New York with New Jersey, Connecticut with New York, and of Pensilvania with Maryland, are not yet finally determined. Nor is the Boundary of North and South Carolina yet settled, or of South Carolina with Georgia."

But the boundary of Maryland and Virginia was settled and determined and laid down by authority of Great Britain and the Geographer to his Majesty, George III., under this treaty. And the boundary of the Potomac is placed distinctly on the left, or north bank of that river, to Point Lookout, and thence south of east to a point on the western shore of the peninsula, and thence is drawn east to Swansecut Creek, on the eastern side of the peninsula. This is the highest authority known to the law of this case. It is by and under treaty laid down with all the care and exactitude

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required by the exigencies of future peace and quiet possessions between the two greatest powers on earth. Now, is it to be supposed or imagined that Great Britain herself, in a negotiation like this, did not know the boundaries between her own provinces, and especially two of her oldest colonies, between which questions of boundary had been much mooted and much discussed before her Lords of the Committee of Trade and Foreign Plantations? If her officials were not at first informed, was not the Royal Observatory at East Greenwich then established nearly a century—from 1675? Newton had made all his discoveries and died 36 years before; he had wrought out the puzzles of the great Circles of the Armillary Sphere, and informed the world how many English statute miles were to be allowed to a degree of longitude in the latitudes of Maryland and Virginia. Halley had succeeded Flamsteed as Royal Astronomer, and had died 21 years before this map was made, and is it to be supposed that Bowen the Royal Geographer, would not seek the most authentic and conclusive information from the law officers of the Crown, and from the State Paper Offices, to authorize him to lay down the boundary of Maryland and Virginia in 1763 as "determined," and as those provinces then "*exercised*" their jurisdictions? Whether he did or not, Great Britain so "determined," and so solemnly that her determination then was notice given to other Powers with whom she treated, by which she was bound, and bound, too, in matters of much importance. All her provinces varied from each other in many particulars of the regulations of commerce, and trade, and navigation, and the vessels of France required the information as to parts of what province they entered and what regulations they were to observe. As to what the *treaty making* power of Great Britain could do with the charters of her provinces, even to annihilate them, it is supposed, admits of no question or debate. Great Britain could have ceded both provinces to France as easily as she acquired Canada, and certainly she could, as she did, fix their bounds.

XIII.

After the restoration of the Lord Proprietor's title and possession of Maryland in 1715, and after the treaty of Paris in 1763, there was an uninterrupted period of peace and comity between her and the Royal Province of Virginia, as long as they were colonies. The boundary on the eastern shore was, by all the inhabitants of both colonies, known to be settled, and there was no collision at Annamessex until lately. The Quakers, and if there were any Papists there left on the marshes or hammocks south of the westernmost angle of Watkins' Point and north of Pocomoke Sound and west of that river, they were not disturbed by any religious persecutions, and they were too far and too inaccessible or inconvenient to the officers of the Virginia laws to be troubled by tax gatherers even, or by summons of any sort of public service; but that the mouth of what was then and now called Little Annamessex, was always known and claimed to be in Virginia, in the latter end of the 18th and beginning of the present century, is known to many now living in Accomack, Virginia. True, that for the reasons already mentioned, of their location, they have not voted in Virginia or paid taxes, or ever, in that time, been treated or have acted as citizens of Virginia. But time does not run against a sovereign or State as to boundary; and Virginia has always continued claim to the tongue of land above Cedar Straits and Pocomoke Sound, by holding and keeping her territory on the south end of Smith's Island west; and as will be shown, she patented the whole extent of the territory up to 1703, and to leading citizens of Maryland. See her patents to Dan'l of S. T. Jenifer, and to Daniel Jenifer (a Register of the Land Office of Maryland) and Anne Toft, his wife, and Welbourne and others, and to John Nelson and Robert Pitts, hereto appended. The grants to some of these patentees were up to Nanticoke Sound. By the by, the name *Herring* Island, on the Coast Survey map, is erroneous —it should be *Herns* or Hern (for Heron Island.) The

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populations of Maryland and Virginia were too similar in manners and customs, and kinds of possessions, and too cavalier alike in their tone, not to assimilate and affiliate in the most cordial relations. The Howards of Maryland had been too close comrades of the Washingtons of Virginia for the Maryland and Virginia people, in their homes and habitations and associations, as well as in their continental lines during the night of the Revolution. The battle of the Barges, at and off Tangier and Watts' Islands, in the Chesapeake Bay, *the very last battle of that Revolution*, was fought by Accomack and Pocomoke and Annamessex people, volunteers who came together like brothers and neighbors and friends, under the illustrious Whaley, a Commodore of Maryland, who fell in the bloody fight, and whose bones now lie, not unhonored, at Onancock, in Accomack. The glorious good he did was not buried with his bones; will not Maryland gratify Virginians by giving them yet a monumental stone?

Accomack County, in Virginia, and Somerset, in Maryland, had jointly contributed to build and incorporate their first academy of learning, (Washington Academy, near Princess Anu, in Maryland) Land was given to it in Accomack, and when population so increased that Accomack could build her own academy, (Margaret Academy, near Pongoteague, in Virginia,) the Legislature of Virginia, in 1790, authorized it to be sold, and to be divided between the two academies. Such was the feeling of amity between the best of neighbors. And these people cared not then what State they were citizens of, but those at Cedar Straits were most convenient to Maryland. The fisheries and fowling were superabundant, and until about forty years ago they "lived and let live" in the most friendly neighborhood and free interchange of fisheries as well as comities of every kind. We repeat that it was not until oyster catching and planting and packing became so profitable, and worth so much, that any "sacra fames auri" ever disturbed that old time state of kindness between these people. But since Vir-

ginians have been arrested and tried in Maryland for fishing in her own waters. The Delegates and Representatives of the several counties and corporations of Virginia, on the 29th day of June, A. D. 1776, reciting their grievances under "the detestable and insupportable tyranny" of George III., King of Great Britain, &c., unanimously declared the independence of the Colony, and ordained and adopted the first Constitution of State government in America. Heroic as was that age, there was no act of men or States more magnanimous and exemplary than the adoption by Virginia of the 21st clause of that first Constitution, to wit:

"The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon. *The western and northern extent* of Virginia shall *in all other respects stand as fixed by the charter of King James the 1st, in the year 1609, and by the public treaty of peace between the Courts of Great Britain and France in the year 1763*; unless, by act of legislature, one or more territories shall hereafter be laid off, and governments established, westward of the Alleghany Mountains. And no purchase of lands shall be made of the Indian nations but on behalf of the public, by authority of the General Assembly."

This generous and gratuitous clause of constitutional conveyance to her sister colonies, in the act of taking upon herself the responsibilities of Independence whilst they were yet colonies, and she had no guarantee that they would back her example, is unexampled in the history of Revolution.

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But she excepted the free navigation and use of the Potowmack and Pocomoke rivers, with the property of the Virginia shores and strands. And her western and northern extent she reserved as fixed by the charter of 1609 and by the treaty of 1763. The latter had modified the extent of her grant in respect to Maryland. She could not, after the treaty, claim to the extent of her grant westward. She had claimed the river Potomac for its whole extent, and she had claimed both shores of the Pocomoke, including its mouth, as high up as the Calvert and Scarbrough line ran across the Pocomoke River. Maryland was fully aware of this cession and reservation, but was not satisfied, and claimed more. She knew of the Hopton grant and of the Calvert and Scarbrough line, and that Virginia had therefore claimed both; and yet of the northwestern territory, between the Ohio and Mississippi rivers, she claimed a share, and this brings us to

XIV.

The cession by Virginia of her immense northwestern territory. She abjured her colonial state, without waiting for others to move; "set the first ball of the Revolution in motion" from her old magazine in Williamsburg, which never ceased rolling until, after ricocheting all over the continent, it stopped at Yorktown, within twelve miles of where it started on her own soil, and there, after Independence was declared, set to with all her mighty men to form the Confederation of the free, sovereign and independent States. The legislatures of the thirteen colonies having approved, and authorized their Representatives in Congress to ratify, the Articles of Confederation agreed on by the Delegates of the United States of America in Congress, the 15th Nov., 1777. Congress ratified them on the 9th July, 1778; *then* voting, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, Virginia, South Carolina, only six States; North Carolina, 21st July, 1778; Pennsylvania, 22d July, 1778; Georgia, 24th July, 1778;

New Hampshire, August 8th, 1778; New Jersey, November 26th, 1778; Delaware, May 5th, 1779, and Maryland not until March 1st, 1781. Why did Maryland decline or fail to join the Confederation of States for three years and four months? She declined until the States which held the new lands of the West, included in their ancient charters, consented to cede them to the United States for the Union and common benefit of all the States. See 10th Henning's Stats. at Large, Appendix "Resolutions and State Papers," pp. 547 to 567, inclusive, the Circular of the President of Congress, September 10th, 1779, the Declaration of Maryland, December 15th, 1778, the Instructions of that State's General Assembly to her Delegates in Congress at the same date, "the Remonstrance of the General Assembly of Virginia to the delegates of the United American States in Congress assembled, the 14th of December, 1779," the "Act of the State of New York to facilitate the completion of the Articles of Confederation and perpetual Union, passed 19th February, 1780," the "Recommendation of Congress for cessions of western territory, September 6th, 1780,"—these and other causes influenced the State of Virginia to pass her resolutions of January 2d, 1781, "For a cession of the lands on the northwest side of Ohio to the United States," on certain express conditions and reservations, among which were the following, to wit:

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"That all the remaining territory of Virginia *included between* the Atlantic Ocean and the southeast side of the river Ohio, and the Maryland, Pennsylvania and North Carolina boundaries, shall be guaranteed to the Commonwealth of Virginia by the said United States."

"That the above cessions shall be void and of non-effect, unless all the States in the American Union shall ratify the Articles of Confederation heretofore transmitted by Congress for the consideration of said States."

And these resolutions caused and induced Maryland, within

the then next sixty days, to join the Confederation the 1st March, 1781.

When granted a common benefit in all the northwestern territory of Virginia, and accepting its reservations and conditions by joining the confederation in consideration of the grant, is she not estopped from denying or disputing "the remaining territory of *Virginia?* Can she righteously say now that the grant to Lord Hopton was bad, and not recognized under the treaty of 1763? That it was not included in Virginia's *reservation?* That the line of Calvert and Scarbrough was never run, or if run, that it now can't be identified and located? That the treaty of 1763 did not finally fix the limits between her and Virginia? Or, if they even were *not* fixed as Virginia claims, can she say that Virginia did *not so mean* when she ordained her constitution of 1776, and passed these resolutions with these expressed reservations? Did not Maryland mean that she would not, whether she legally could or not, dispute the "remaining territory of Virginia, as *she, Virginia, claimed it,* when she, Maryland, accepted a grant worth millions more than the small reservations named? True, Congress, afterwards, wisely declined the guarantee on the part *of the United States,* leaving the questions of boundary to be decided and agreed between the States themselves, or the proper tribunals to decide them judicially, if not agreed; and Virginia executed the cession without the guarantee of the United States; but was not *Maryland* bound by accepting the cession, or her part of the cession, from Virginia, in consideration of joining the Confederation? Did she not get millions over her quid pro quo? Did she not assent? Is she not morally and legally estopped from claiming now what she knew Virginia then claimed to be part of her remaining territory? Let justice and equity, and considerations higher than territory or any other price, plead the reply. See Tazewell's Fragment, Hubard's Report appended; the Report of Congress, 11 H. Stats. at Large; the Deed of Cession, Id. appendix, 567, 571, made 1st March, 1784.

XV.

Having taken this general review of the history of boundaries between Virginia and Maryland, which, it is presumed, will control the decision on the fact and the law of the case, we now proceed to state and comment on the incidental facts which may prove tests of the history.

I.—Patents.

We must premise that the Commissioners on the part of Virginia, who have heretofore acted on this question of boundary on the eastern shore of the Chesapeake Bay, have overlooked, or not been informed of, a fact, which would have shown them the eastern shore boundary in limine. A stranger to the history of the counties of Accomack and Northampton, or one ignorant of it, might well be deceived in looking for the patents of Virginia granted to her inhabitants on her part of the peninsula of the Chesapeake. The colony of Virginia was divided in 1634 into 8 Shires, and *Accawmack* was one of them, consisting then of the whole of Virginia's part of the peninsula. By act 13th of the year 1642 '3, the name of the whole was changed to "Northampton." For the Royal Grants to 1642, '3 one must look to the Index of Accomack. After that period the Index of "Northampton" must be looked to. Accomack resumed her original name (when is not shown by Henning) and continued to be called Accomack to nearly the end of colonial times. See 1 H. S. at L. p. p. 224, 249, and index of that vol. under head "Counties." A regiment was authorized to be raised for Accomack and Northampton by act, ch. 1, Dec. 1, 1775, showing they were then divided into Accomack and Northampton. See 9 H. S. at L., p. 76. Northampton was probably divided under a general law providing for the division of frontier counties passed in the 3 Sessions of the General Assembly from 1702 to 1705 See 3 H. S. at L., p. 284. But this is immaterial, except to note how the patents of the eastern shore have been overlooked. Seeing no

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name of "Northampton" adjoining Maryland on the maps and "Accomack" there always, the Accomack index was heretofore looked to alone. By examining the index for both of those counties, we find patents for every foot of the territory from the western shore of Smith's Island in the Chesapeake Bay, to the eastern shore of Assateague Island on the Atlantic Ocean, on the whole course of the divisional line run by Calvert and Scarbrough in 1668, to Legin on the Chesapeake side.

Patents issued during the Royal Government of Va.
Accomack County,

To Robert Pitt, Oct. 2, 1663—3000 acres, north by Pocomoke and west by the Bay.

To Chas. Scarborough, April 4, 1668—600 acres, the western islands of the Chesapeake Bay.

To Henry Smith, Oct. 9, 1667—1000 acres. *Pitscraft on Smith's Island, the other half of the land granted to same man for part of same tract, and the patents of each state calling a divisional line of Maryland and Virginia.* The tract, 2000 acres, was only to be divided by a right line east and west, so as to lay off 1000 acres on each side.

To Jno. Taylor, Oct. 27, 1673—34 acres—Little Watts' Island. This is the island which the present Commissioners contend was probably the end of Watkins' Point, on the theory of great washings away. Here is proof it was an island in 1673, and though little then, there now it remains.

To Thos. Welburne, April 4, 1678—83 acres—Feak's or Fox's Island, north of Watts' Island. This is a group of islands, which the same theory claims to have been main land and part of Watkins' Point.

To John West, Nov. 25, 1679—2500 acres, embracing George's Island in the Pocomoke River; showing that Virginia owned the islands at the mouth of that river.

To John Custis, April 20, 1680—100 acres—Cotham's Island in Pocomoke River, showing same.

To Capt. Wm. Custis, April 17, 1686—800 acres on Feak or Fox's Island.

To John Carter, Oct. 26th, 1699—130 acres, Fox's North Island. This is the first south of Cape at Cedar Straits.

To McKenny and Jenkins, April 25th, 1702—150 acres, south end Watts' (Big Watts') Island.

To same, same date—24 acres, Gabriel's alias Watts' (Little) alias Goat Island.

To Francis McKennie, Arcadia Welburne, Daniel of St. Thomas Jenifer and John West, } Oct. 23, 1703. | 3304 acres. } The islands lying north of Tangier Island, Herne or Hern, (contraction of Heron, now laid down as Herring on Coast Survey map,) Island, and the six islands, (Smith's Island cut into Thoroughfares,) &c.; and the beginning and ending of this grant is near Nanticoke Sound. Tangier and Smith's Islands and their groups of smaller islands, form Tangier Sound as far north as Kedge's Straits, between Smith's Island and South Marsh. South Marsh and Bloodsworth Island form Nanticoke Sound up to Hooper's Straits, called by Smith and by the Act of Virginia, of 1663, the Limbo. At the eastern head of Nanticoke Sound is Monie Bay, into which the only Wicommico River, on the eastern shore, and Monie River empty; and Monie Bay and Nanticoke River and Fishing Bay all empty into Nanticoke Sound. The chart of the Coast Survey lays it down as a part of Tangier Sound, but that is an error. Those charts are not to be relied on for names, though very accurate and reliable for topography.

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South of Monie Bay is Manoakin River, emptying into Tangier Sound, and there, on the Manoakin, Col. Scarbrough had his meeting with the Quakers and others, over whose doors he put the "broad arrow" (the mark of Royal Goods) in 1663. In a right line, west of the mouth of the Manoakin, is South Marsh, and near Nanticoke Sound was the initial and terminating mark of this patent to Daniel of St. Thomas Jenifer and Francis McKennie, among others—one of them among the wealthiest and foremost men, and the

other among the foremost divines of Maryland. One of them, Jenifer, lived at or near Annapolis, the other on the Eastern Shore, not far from the locality of the patent; one of these co-patentees, Col. John West, of Accomack, was a considerable man of his day, often in the House of Burgesses of Virginia. Is it to be supposed that they did not know which was Maryland and which Virginia territory, or that they did'nt know or had forgotton where the line of 1668 was run only 35 years before, that it was not far from Nanticoke Sound? The patent speaks broadly—"near Nanticoke"—the meaning only of which was that they were to go to the line between Maryland Virginia, and when there, they would be near Nanticoke. They may have erred, if they went to South Marsh; but if they went to Smith's Island only, that is enough to show that the pretensions of Maryland now are contradicted by two of her most respectable citizens then. It can't be said that these men conspired to take territory from Maryland. If John West was so disposed, there were two intelligent sons of Maryland to protect her interest. The truth is, that the line of 1668 cuts now not far from Nanticoke Sound, and far north of Cedar Straits, as proved by the patent.

To Eliza Scarborough and Arthur West, May 2, 1713—900 acres, all Tangier Island.

To John Marshall, June 16th, 1727—170 acres, on the bay side, &c., "to a marked oak, *being one of the division trees between Virginia and Maryland.*"

Commonwealth's Grants.

To Sacker Nelson, May 4th, 1787—476 acres, northerly and easterly on Pocomoke Sound, southerly on the Thoroughfare, westerly on Tangier Sound. He is the fountain of tradition, whose memory lives immortal in the title of "King Nelson" among the islands and hammocks of Tangier Sound and Annamessex. See deposition. He was a grantee of part of Fox's Islands in Virginia.

To Richard Evans, Oct. 31st, 1791—47 acres, at Queen's Ridge, on the bay side, at a point of marsh near Tangier Sound.

These patents embrace 13,784 acres, and cover every acre of land and water south of the Calvert and Scarbrough line of 1668, main and islands, between the Chesapeake Bay and Pocomoke River; in other words, the whole of the disputed territory west of the Pocomoke River. Robert Pitts' patent, calling for its north line from Pitts' Creek, on the divisional line of the Colonies, to the bay, granted every foot of land on the main between that divisional line and the Pocomoke River and Sound. The other patents embrace all the islands of the Pocomoke Sound and of the Chesapeake Bay and Tangier Sound, from Watts' Island to near Nanticoke Sound. All of these granted by Virginia north of the Calvert and Scarbrough line, prior to 1668, were expressly saved to the patentees by the Articles of Agreement signed and sealed by Calvert and Scarbrough. Any grants made by Virginia after that Agreement in 1668, north of that line, were null and void to the extent of the part north. But the patents of Lord Baltimore prior to 1668, for lands south of that line, *were not saved by the agreement between Calvert and Scarbrough;* to the patentees of Maryland they retained no title whatever in any name, or by any authority, and all patents granted by Lord Baltimore, subsequent to 1668, south of that line, were of course void.

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So much for the main territory west of Pocomoke River and north of Pocomoke Sound and east of Tangier Sound, and for the islands of the bay and Tangier Sound and Pocomoke Sound.

We now come to the territory east of the Pocomoke River, beginning at that river where the Calvert and Scarbrough line runs east from Watkins' Point on the West, "over Pocomoke River."

To Robert Holston, (erroneously here Houston,) April 5th, 1666—500 acres, bounded by the Pocomoke on the

northwest and by Holston's Creek. It was to near this Holston's that the line of Calvert and Scarbrough run.

To Col. E. Scarbrough, Sept. 10, 1664—2000 acres, south by Crooked Creek, near Pocomoke River.

To John Wallop, June 10th, 1664—400 acres, at Pocomoke.

To Robert Pitts, Oct. 2, 1663—3000 acres, north by the Pocomoke and west by the Bay, (meaning Tangier Sound or Bay.)

To same, March 12, 1662—1000 acres, at Pocomoke.

To John Williams, April 5th, 1666, (same day as Robert Holston's patent,)—500 acres, (same quantity as Robert Holston's,) W. S. W. by Robert Holston's, northwest by Pocomoke River.

To Thomas Davis, April 5th, 1666—400 acres, on Pocomoke.

To Jas. Henderson, April 5th, 1666—400 acres, next to Thomas Davis, on the Pocomoke River.

To John Davis, April 5th, 1666—700 acres, north by Pocomoke, west by Davis' Branch.

To Henry Smith, April 5th, 1666—1700 acres, on Pocomoke.

Radcliffe, Nov. 9th, 1666—1200 acres, Pocomoke, on Crooked Creek.

To Daniel Foxcraft, Oct. 30th, 1669—600 acres, south side of Pocomoke River.

D. Browne, Oct. 16, 1672—3700 acres, Jolls', (now called Jolly's Neck,) Pocomoke River.

Capt. S. Littleton, Sept. 9th, 1679—400 acres, at Pocomoke, formerly, &c.

John Washburn, April 30th, 1679—600 acres, Pocomoke River, M. Lester's land.

Col. S. Littleton, April 30th, 1679—150 acres, on the Forehead Neck, north of King's Creek, at Pocomoke.

On the Divisional Line.

John West, Nov. 25, 1679—2500 acres, Pocomoke, north of Missongo Creek, and embracing George's Island, in the Pocomoke River.

John Tankard, Oct. 2, 1680—2000 acres, between Pocomoke and Chingotengue, on the Main.

Col. Jno. Custis, Sept. 22d, 1683—4600 acres, at Jolle's or Joll's Neck, eastern part, 2000 acres, patented by Edmund Scarbrough.

Adam, April 20th, 1686—600 acres, at Pocomoke.

To Wm. Brittingham, Nov. 7, 1700—96 acres, beginning at Pitts' alias King's Creek, on the divisional line, &c.

Nath'l Littleton, Oct. 24, 1701—150 acres on Forehead Neck, north of King's Creek on the Pocomoke.

Capt. Daniel Jenifer, (of Md.) Oct. 2, 1680—2500 acres, between Crooked Creek and the Pocomoke on the North Messango.

In these 23 patents granted about the date of the Calvert and Scarbrough line; some shortly before, and some shortly after, 1668, we find 31300 acres at and on the divisional line where it ran across the Pocomoke River, and thence to the mouth of the Pocomoke and the islands of the Pocomoke River, and also between the Pocomoke River and Chincoteague Creek east. Many of these patents name the divisional line of the two colonies as one of the lines of the patents, next following the line of Scarbrough and Calvert running east, we find the following patents.

To Dan'l Selby, Nov. 9, 1666—600 acres on the Swanscute, alias Great Mattapony.

To Edward and John Smith, Nov. 9, 1666—500 acres on the Mattapony.

Jno. Pike, Nov. 9, 1666—400 acres north of Daniel Selby at Mattapony.

To Daniel Jenefer and Ann Toft, his wife, Feb. 12, 167[illegible]

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—11300 acres; sea-board. Stokely's Branch, 5000 acres.—Neck between Chingoteague and Swansecute on the *divisional line.*

J. Wallop, alias, &c., April 9, 1674—450 acres; Great Mattapony, alias Swansecute on the divisional line, &c.

Major Edmund Bowman, Oct. 5, 1674—2264 acres, north side of Swansecute, alias Great Mattapony on divisional line.

These 6 patents granted 15514 acres at an near Swansecute on the divisional line.

Next following the line of Calvert and Scarbrough east to the shore of the main land on the sea-side.

Col. E. Scarbrough, June 22, 1664—3000 acres, north of Chingoteague Creek.

Lt. Col. John Wallop, April 20, 1670—3050 acres, south side of Chingoteague Creek.

Daniel Jenifer, of Md., Feb. 12, 1671-2—11300 acres; Stokely's Branch. (Sea-board.)

Ann Toft, (of Accomack—Daniel Jenifer's wife,) Feb. 12, 1671-2—5000 acres; neck between Chincoteague Creek and Swansecute Creek "on the divisional line of Maryland and Virginia."

Sam'l Taylor, April 9, 1674—700 acres; Chincoteague Creek.

Edm'd Robins, May 27, 1675-6—680 acres at Chincoteague. Beginning at divisional line between Virginia and Maryland.

Col. S. Littleton, April 4, 1678—1000 acres at Chincoteague Creek.

Thos. Gascoine, July 15, 1715—1093 acres; head of Chincoteague Creek.

These 8 patents, between Swansecute and the sea-side of main, contain 24730 acres at and near Chincoteague Creek *on the divisional line*, &c.

Then following the Calvert and Scarbrough line east to
islands between the main land and the sea beach of As-
eague Island.

Hill Drummond, April 24, 1700—96 acres. Pope's Is-
d *on divisional line*, thence to the Atlantic shore on the
ch of Assateague Island.

Col. Daniel Jenifer and Wm. Stevens, April 16, 1683—
0 acres, south end of Assateague Island, on the divisional
e.

Dan'l Jenifer, April 20, 1687—3500 acres. Assateague
and, on the divisional line.

John Morris, April 28, 1691—300 acres, between Chinco-
gue and Assateague.

Wm. Kendall, April 29, 1692—2729 acres, northeast end
Chincoteague, including Piney Point.

John Robins, April 29, 1692—2765 acres, southwest end
incoteague Island and Island of Marsh.

Capt. John Custis, April 21, 1695—250 acres, northern
l of Chincoteague Island.

Wm. J. Aydelott (one of the present Commissioners of
ryland) and Benj. Blades, July 30, 1841—880 acres on
steague Island.

These 7 patents granted 10,624 acres on Assateague and
incoteague Islands to the ocean between it and Pope's
and, two of them on Assateague calling for the divisional
e between the colonies of Virginia and Maryland. I have
d those on Chincoteague Island to show that no colonial
e ever cut that island. Its north end is nearly up, if not
te, to the line of 38° N. latitude. By the best charts fur-
hed by the Coast Survey office, the parallel of 38° passes
north end of Chincoteague three-quarters of one mile,
l the Calvert and Scarbrough line cuts Assateague Island
th of that parallel two miles. It is just about as far
th of that parallel on the sea side of the peninsula as it
outh of it on the bay side thereof. A right line from

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Smith's Point to Swanseacute, or from the same point to the terminus of the Scarbrough and Calvert line on the east shore of Assateague Island, either, will cut the main land at Cedar Straits. Drawn from Smith's Point due east it terminates on the sea-shore south of Chincoteague Island, and it would give to Maryland an average breadth of 8 miles of territory, east of the Pocomoke River, to the sea, which at no time did she ever claim. *East of that river to the sea, south of the Calvert and Scarbrough line*, Maryland never laid a patent; there her citizens on the line pay taxes in both States now, and Mr. Aydelott, of this Commission, by accepting his patent on Assateague Island, anywhere on it, recognizes the fact that the Calvert and Scarbrough line runs north of an east line from Cedar Straits or from Smith's Point.

Besides the foregoing patents from the Accomack Index, we add the following from the Northampton Index:—

Miles Gray, March 26, 1672—400 acres, branch of Great Mattapony alias Swanseacute.

Daniel Jenifer, Feb. 12, 1671-2—5000 acres; part called Chingoteague granted to E. Scarbrough in 1664; residue lying on the northwest side of the 3000 acres.

Wm. Whittington, Oct. 2, 1672—5000 acres, all Chingoteague Island.

Capt. John West, Oct. 3, 1672—1000 acres, at Chingoteague, (on the main,) south by Captain Richard Hill and northeast by Capt. Daniel Jenifer.

Thos. Nickerson, Oct. 9, 1672—400 acres, at Chincoteague, adjoining John Wallop.

John Robins, Oct. 7, 1672—500 acres, at the sea side—southwest by the land of Southey Littleton, northeast by the divisional line between Maryland and Virginia.

These patents granted 12,300 acres at and near the line.

The quantity of land in the grants of these different sections amounts to 95,952 acres, nearly 150 square miles, on

a line, from the Chesapeake Bay to the ocean, 45 miles in length from the western shore of Smith's Island to the eastern shore of Assateague Island. And the part of this line north of the 38th parallel, lying east of the Pocomoke River, Maryland don't pretend to dispute, whilst she claims all south of the line west of the Pocomoke River and north of Pocomoke Sound, though the line there is south of the 38th parallel. These are strange facts, to be accounted for only by oysters! Virginia granted an average of three and a third square miles for every mile on this line.

County Bounds.

We can't find any north bounds of Accomack in Virginia except the Virginia and Maryland line. But the Commissioners on the part of Maryland have produced a commission from the proper authorities of the county of Somerset, Md., to certain "Commissioners *to lay off* so much of Smith's Island as lies within the body of Somerset County aforesaid, into a separate and additional election district before the 1st April, 1835." Commission is dated 8th April, 1835; return dated 16th June, 1835:—"in pursuance of the said order we have viewed, laid out, and return as follows, for said election district, to wit: beginning on the east side of said island, at a place well known by the name of 'Drum Point;' thence westerly cross to the bay to a hammock called Sassafras, lying on the bay shore; thence by and with the bay up to Kedge's Straits; thence by and with the Sound to 'Drum Point.' And that we at the same time have elected the Methodist meeting house as the most suitable and convenient place for holding the elections in said district."

By embracing all of the island which laid in Somerset County, it embraced all of it lying in Maryland. Somerset County extended north to the Nanticoke. Here, then, we have a late report of Somerset's own Commissioners setting forth all of Smith's Island in Maryland. The district bounds began at "Drum Point." See the charts of Coast Survey.

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"Drum Point" is north of Little Annamessex River on the main. It is but *one mile* south of the 38th parallel of latitude, and below Barnes' Point, on the east and west line of which the stones (Potomac stones) apparently were found, said to be boundary marks between the two States—yet John Cullen (see his deposition), one of the Commissioners, swore before these present Commissioners, that he always deemed and held Horse Hammock, on Smith's Island, over two miles south of "Drum Point," to be in Maryland, and Maryland appointed a Justice of the Peace residing there as late as—(see deposition.) But John Cullen ought to have known better. He was the Justice who arrested John Tyler, a Virginian, for catching oysters at Filleby's Rock, north of the Great Rock, arrested just off Horse Hammock, in the schooner Fashion. Tyler was acquitted by the Somerset Court on the ground that he was not oystering in Maryland waters. Sued the Circuit Court of 8th Judicial Circuit of Maryland, held 3d Oct., 1854, said Cullen, in Somerset County, for arresting him and detaining his vessel, and recovered, by judgment of the Somerset Court, $1000 damages and costs. See Records of the Court appended. This was as late as 1854, and the Hon. Isaac D. Jones, Esq., was one of the counsel of the case for Cullen. See the two records.

Again the Commissioners of Maryland exhibited "Maryland Council proceedings."

"Liber H. H., folio 268." Commission to Stephen Horsey and others, "to lay out a county, bounded on the south by a line drawn from *Watkins' Point*, being the north point of yt bay into w'ch the river Wighco (formerly called Wighcocomaco and afterwards Pocomoke and now Wicocomaco again) doth fall, to the ocean on the east, Nanticoke River on the north, and by the sound and Chesp. Bay on the west; to be erected into a county by the name of Somerset, in honor of our dear sister, Lady Mary Summerset. 22 *August*, 1666."

Now this clears away all mists from these obscuring

doubts *about where Watkins'* Point was *and is*. Smith's map placed it exactly where this Council of Maryland describes it, and exactly where Calvert and Scarbrough ascertained it to be in 1668. The point described by this paper is undoubtedly the point of Watkins' Point *at Cedar* Straits. Calvert and Scarbrough did not start at that part of Watkins' Point, but at the extremest part of its westernmost angle. This is tested by the line being a right east line. Then we have certified beyond all peradventure that Maryland authorities, metropolitan and county, colonial and State, have known where Watkins' Point was all the time ever since 1666.

That happened to be exactly two years before the Commissioners, Calvert and Scarbrough, in 1668 *determined* the part of Watkins' Point *from* which the line should be run east, ordered by the charter of Maryland to be a right line. Cedar Straits never was and is not now the westernmost angle of Watkins' Point, and did not draw the Commissioners, in 1668, that far south; but the legal and logical effect of their "Articles of Agreement" was to draw the southern boundary of Somerset County from Cedar Straits up to the north headland of Little Annamessex River to another part of Watkins' Point.

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And what becomes of all the speculation about a proclamation of Governor Harvey, of Virginia, recognizing Maryland's right of Indian traffic down to Onancock, below Little Watts' Island? What of the theory of the washing away of Watkins' Point? What of the traditions of the saying of King Nelson? By the by, in justice to his majesty's knowledge of the affairs of the God Terminus, he may have known *Summerset County's* boundary to have been fixed on the north end of Big Fox Island, at the Cedar Straits, in 1666. After these records, can there be any pretence of a doubt about where Watkins' Point is, or is not all doubt about where it was and is, now a mere pretence?

Again: there is another record of Summerset County, viz:

"The following is among the Orders agreed upon by ye Com'rs of Somersett Countie this 17th Jan'y, 1666. Present—William Stevens, (the assignor of Pittscraft to Henry Smith,) Capt. Wm. Thorne, Mr. James Jones, Mr. John Winder and Mr. Henry Boston, Mr. George Johnson and Mr. Stephen Horsi, High Sheriff.

"The highway for the county of Sommerset from ye landing place upon Capt. Goyeder's land in Pocomoke River to Marumsco Dambs, near ye house of Robert Hignutt, and from thence doune to the head of Thomas Price's Neck to ye head of William Coleborn's Creek, and from ye head of Will Coleborn's Creek *to Watkins' Point*, from ye Dambs yt lyeth by Robert Hignutt's to ye lower dambs yt lyeth at the head of Annamessick River, from thence to ye Lower dambs yt lyeth at ye head of Lack creek of Manokin River, and from thence to ye head of Manokin River, and from thence to the head of Wicocomoco Creek." This is from a certified copy.

Again:—same day and year is: "The bounds of Annamassicke hundred. Annamassicke beginning at *Watkins' Point*, running to the mouth of Marumsco Creeke up ye westernmost side of ye said creeke to Marumsco dambs, and from *Watkins' Point* to the North Pointe of Annamassicke River, and from thence runninge up ye midst of ye neck of land called desert."

Thus the bounds of county, of highway, of hundred of Summerset County called for *Watkins' Point* north of Pocomoke Sound.

Again:—see same book of records of the Council of Maryland:—it is supposed Summerset was organized out of Dorchester County, Maryland; Worcester County, adjoining Accomack County, Va., was laid off from Summerset. Now Worcester borders on Virginia *by a right line east*, and has never been disputed or questioned since 1668. Worcester was laid off in 1742 on that part of the line formerly of Summerset. Is that *right line* "agreeably with" an east

line from Cedar Straits or an east line from the north headland of Little Annamassicke? Michler's map and line, continued by De La Camp, will show.

See copy of deed to John Tyler from Henry Smith, of the county of Summersett, Md., 1693, conveying Pittscraft, on Smith's Island; also, copy of paper found in the possession of Alexander Tyler, on Smith's Island, describing a survey of land, part in Virginia and part in Maryland; also, copy of deed from Elisha Crocket and wife to Richard and Wm. Evans, found on Smith's Island, dated 30th August, 1828; also, copy of deed from Jacob Sparrow and Teakle Evans, found on Smith's Island, dated 24th Sept., 1844.

We are informed also by Mr. Aydelott, one of the Commissioners on the part of Maryland, that a patent ought to be found, from Virginia, for a part of "Long Point, owned by John Mason—the extreme northeast main land of Accomack—a large body, near to Sandy Hill, in Worcester Co., Md., part in Accomack County, Va., and part in Worcester County, Md.—all now occupied by Judge John R. Franklin, who now pays taxes in both Maryland and Virginia.

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If these tests of the true boundaries of the two Colonies and States of Virginia and Maryland, both on the eastern and western shores of the Chesapeake, are not sufficient, there are abundant other proofs in the county surveys of lands under private deeds, of old vestry books of the Church of England in Virginia during Colonial times, and of Ferries, (as to which see McDonald's first report,) and of Maps. We have not been able to examine and elaborate any but the last. But there is one test which is singular, the location of the Crisfield Railroad. The line of De La Camp, containing the Calvert and Scarbrough line west from Swanneacute, cuts the southwestern corner of the wharf of that company at Crisfield. The line passes James Tawes' house at the head of Somers' Cove, and cuts the southwest corner of the wharf of the Crisfield Railroad. How came that road located at its terminus exactly, ad punctum on the Calvert

and Scarbrough line? Did Tyler's trial and acquittal and his recovery of $1000 in Maryland's own Circuit Court of Summersett, in 1854, wherein Mr. Crisfield, after whom the town of Crisfield is called, was counsel for Tyler, of Virginia, and Mr. Jones, of the present Commission, was counsel for John Cullen, of the Election District Commissioner on Smith's Island, teach the stockholders of that railroad where, to a pin's point, to terminate that road? If it was accident to terminate where it does, it was an accident of so rare occurrence, that any insurance company might insure against its recurrence at the least appreciable fraction of one per cent.! We forego such further inquiries. They are vain. We can't treat Watkins' Point, and the part of it from which the boundary line east was run "over the Pocomoke River," as a fable or a myth. It was agreed, it was sealed, it was approved and established. If not exactly a due east line, it was near enough to a right angle with the meridian to be deemed established. It was established by a sealed and recorded and admitted agreement, and there is no possibility of destroying its identity or doubting its verity. Tradition can't run against the record; and limitations can't run against a State boundary. That question the Supreme Court of the United States has decided in the case between Massachusetts and Connecticut.

We have but few words to add about maps. We will abide by Smith's map of 1629; by Bowen's map for the eastern shore boundary, and by the map of the treaty of 1763, and by Augustine Herman's map, furnished or adopted by Lord Baltimore, and by Lord Baltimore's claim against Penn, that the boundary on the eastern shore was at the time of 1681–2 settled by Commissioners, and he claimed so far south only as Watkins' Point. The whole matter was concluded against all theoretical speculations, and against all time of possession and against all traditions, and patents and ferries and boundaries of counties and hundreds and highways, in 1668, by Philip Calvert and Edmund Scarbrough. It is unnecessary and would be supererogatory to

recapitulate the evidences of right to the whole river of Potomac.

Virginia claims the river Potomac to the left or north bank on the western shore, and to the Scarbrough and Calvert line on the eastern shore of the Chesapeake; from Point Lookout to the extremest part of the westernmost angle of Watkins' Point, the promontory formed by the north head-land of Little Annamessex River or Creek, on the eastern side of Tangier Sound, which head-land or promontory is the initial and terminating point of survey between the two States of Maryland and Virginia, ascertained, agreed and fixed as described, A. D., 1668, by and under their joint and several proper authorities, and by them approved and adopted.

With the highest respect:

HENRY A. WISE,
D. C. De JARNETTE,
WM. WATTS,
Commissioners on the part of Virginia.

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STATE PAPERS, COLONIAL.

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BEST AVAILABLE COPY

SCARBOROUGH'S EXPEDITION.

The following is a copy of the Act of the Virginia Colonial Assembly, passed September 10, 1663, under which Col. Scarborough professed to act in his military raid upon the people of Annamessex and Manokin. See his account of his expedition, page 224.

Mr. Jones is indebted to Gen. Wise for this copy, which is thus endorsed: "Copied by me for Hon. I. D. Jones, Oct. 2d, 1872. HENRY A. WISE."

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ACT II.

An Act concerning the Bounds of this Collony on the Eastern Shore.

His Majesties Interest on the Eastern Shore of Virginia, together with some concernments of Lord Baltimore's coming into consideration of the Right Honourable Governour, and Council, and Burgesses of this Grand Assembly, they pretermitting for the present some other of His Majesties Concerns of Land until a fitter opportunity, do think fit for the present to Enact, And be it further enacted by the said Right Honourable the Governour, Council, and Burgesses of this Grand Assembly, and the Authority thereof, That publication be made as soon as possible by Coll. Edmund Scarbrough, his Majesties Surveyor General of Virginia, Commanding in his Majesties name all the inhabitants of the Eastern Shore of Virginia from Watkins' Point Southward to render obedience to his Majesties Government of Virginia, and make payment of his Majesties Rents and all publick Dues to his Majesties Collony of Virginia. And whereas it has been controverted by some ignorant ill-disposed persons, where Watkins' Point, the Lord Baltimore's Southernmost Bounds on the Eastern Shore is scituate; This Grand As-

sembly by the care and special Enquiry of Five able selected Surveyors and Two Burgesses, and on the due Examination thereof, conclude the same place of Watkins' Point to be the North side of Wicocommico River on the Eastern Shore, and near unto and on the South side of the Streight Lymbo, opposite to Patuxent River; which place, according to Capt. John Smith, and Discoverers with him, in the year 1608 was so named, being the Lord Baltimore's Bounds on the Eastern Shore, within which Bounds his Majesties Subjects which now are seated, are hereby commanded to yield due Obedience at their perils: And in case the Lord Baltimore's Lieutenants or Deputies shall not be fully convinced of his or their actual or pretended Intrusions: This Grand Assembly of Virginia in due obedience making the particular part of Virginia their present care, on his Majesties behalf do engage and command Coll. Edmund Scarbrough, Mr. John Catlett, and Mr. Richard Lawrence, or any two of them, whereof his Majesties Surveyor General to be one, That upon convenient notice and Assignment of time and place at Monakin, or any other part of His Majesties country of Virginia, on the Eastern Shore, they or any two of them as aforesaid, shall give a Meeting to the Lord Baltimore's Lieutenants or Deputies, or his or their Substitutes as aforesaid, the account whereof to be returned to His Majesties Governour and Council of Virginia, and debate and determination thereof; and in the meantime all Inhabitants on the Eastern Shore as aforesaid, are required in his Majesties Name to conform due Obedience to this Act of Assembly: Be it also Enacted, That the Surveyor General of Virginia aforesaid, is hereby commanded and authorized to improve his best Abilities in all other his Majesties Concerns of Land relating to Virginia, especially that to the Northward of Forty Degrees of Latitude, being the utmost Bounds of the said Lord Baltimore's Grant, and to give an account of his proceedings therein to the Right Honourable Governour and Council of Virginia.

Passed at a Grand Assembly held at James City, Sept. 10th, 1663, and in the 15th year of Charles II.

STATE PAPERS, COLONIAL.

The following letters were copied from documents obtained by Col. DeJarnette, from the British Archives in London. —*I. D. Jones.*

STATE PAPERS, COLONIAL, Vol. 5, No. 27.

(August, 19, 1629.)

Most Gracious and Dread Sovereign:

Small benefits and favors can speak and give thanks, but such as are high invaluable, cause astonishment and silence. I am obliged unto your Majesty for the latter in such a measure as reflecting upon my weakness, and want of merit, I know not what to say. God Almighty knows, who is the searcher of hearts, how mine earnes to sacrifice myself for your Majestie's service. Yet I do best know how to employ my endeavors worthy of that great goodness and benignity which your Majesty is pleased to extend towards me, upon all occasions, not only by reaching your Gracious and Royal hand to my assistance in lending me a shipp (for which upon my knees I render your Majesty most humble thanks,) but by protecting me also against calumny and malice, which hath already sought to make me seem foul in your Majesties eyes. Whereas I am so much the more confident of God's blessing, upon my labor in these plantations (notwithstanding the many crosses and disasters, I have found hitherto) in that a prince so eminently virtuous hath vouchsafed to take it into the arms of his protection and that those who go about to supplant and destroy me, are persons notoriously lewd and wicked. Such a one is that audacious man, who being banished the colony for his misdeeds, did the last winter (as I understand) raise a false and slanderous report of me

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at Plymouth which coming from thence to your Majesty's knowledge, you were pleased to refer to some of my lords of the Councell by whose hon'ble hands (for avoiding the ill-manners of drawing this letter to too much length) I have presumed to return my just and apology to your Majesty.

But as those rubbs have been laid to stumble me there (which discourage me not—because I am confident of your Majesty's singular judgment and justice, so have I met with grave difficulty and incumbrances here which in this place are no longer to be resisted, but enforce me presently to quit my residence and to shift to some other warmer climate of the new world where the winter be shorter and less vigorous. For here y'r Ma'ty may please to understand, that I have found by too dear bought experience, which other men for their private interests always concealed from me, that from the middle of October to the middle of May, there is a sad fare of winter upon all this land, both sea and land, so frozen for the greatest part of the time, as they are not penetrable no plant or vegetable thing appearing out of the earth, until it be about the beginning of May, nor fish in the sea, besides the air so intolerably cold as is hardly to be endured. By means whereof, and of much salt meat my house hath been an hospital all this winter, of 100 persons, 60 sick at a time, myself being one, and 9 or 10 of them died. Hereupon I have had strong temptation to leave all proceedings in plantation and being much decayed in my strength to retire myself to my former quiet, but my inclination carrying me naturally to these kind of work, and not knowing how better to employ the poor remaynder of my days then with other good subjects to further the best I may the enlarging your Majesty's Empire in this part of the world, I am determined to commit this place to the fishermen that are able to encounter storms, and hard weather, and to remove myself with some 40 persons to your Majestie's dominion of Virginia where if your Ma'ty will please to grant me a precinct of land with such privileges as the King, your father, my gracious Majesty was pleased to grant

me here I shall endeavor to the utmost of my power to deserve it, and pray for your Majesty's long and happy reign as

Your Majestie's most humble and faithful subject and servant

GEORGE BALTIMORE.

Feryland, 13th August, 1629.

STATE PAPERS, COLONIAL, Vol. 5, No. 40.

(November 30th, 1629.)

Right Hon'ble:

May it please your Lordships to understand that about the beginning of October last, there arrived in this colony the Lord Baltimore, from his plantation in Newfoundland, with an intention, as we are informed, rather to plant himself to the Southward than settle here, although since he hath seemed well affected to this place, and willing to make his residence therein, with his whole family. We were readily inclined to render unto his Lordship all those respects which were due unto the honor of his p'son, or which might testify with how much gladness we desired to receive and entertain him, as being of that eminence and degree, whose presence and affection might give great advancement to this Plantation. Whereupon, according to the instruction from your Lordships and the usual course held in this place, we tendered the oathe of Supremacy and Allegiance to his Lordship and some of his followers, who making profession of the Romish Religion, utterly refused to take the same, a thing which we could not have doubted in him whose former employment, under his late Majesty might have endeared to us a persuasion he would not have made denial of, that in point whereof consisteth the legality and fidelity which every true Subject oweth to his Sovereign.

His Lordship then offered to take this oath (a copy whereof is included) but in true discharge of the trust imposed in us by his Majesty, we could not imagine that so much latitude was left for us, to decline from the prescribed form so strictly

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exacted, and so well justified, and defended by the pen of our late Sovereign, Lord King James, of happy memory. And among the many blessings and favors for which we are bound to bless God, and which this Colony hath received from his most gracious Majesty, there is none whereby it hath been made more happy, than in the freedom of our Religion which we have enjoyed, and that noe Papists have been suffered to settle their abood amonget us.

The continuance whereof we most humbly implore from his most sacred Majesty, and earnestly beseech your lordships, that by your mediations, and councils, the same may be established and confirmed unto us. And we, as our duty is, which the whole Colony shall always pray for his Majesties long life and eternal felicity, from whose royal hands this Plantation must expect her establishment, and for whose Honor, God hath reserved so glorious a work as the perfection thereof. We humbly take our leaves,

Your lordships very humble Servants,

SAM. MATTHEWS,
JOHN POTT,
ROGER SMYTHE,
W. CLAYBORNE.

The 30th November, 1629.

(Addressed) *To the right honorable the Lords of his Ma'ties most hon'ble Privy Councell.*

(Endorsed) *From Virginia, 30th November*, 1629.

I certify that the above is a true and authentic copy, taken from the volume above named.

JOHN MCDONAGH, *Record Agent.*

JULY 3d, 1871.

STATE PAPERS, COLONIAL, VOL. 5, No. 39.

(NOVEMBER 22D, 1629.)

SIGNED CHARLES R.

Right trusty and well beloved:

We greet you well. Such is, and ever hath been the estimation we make of the persons of our loving subjects, who

employ themselves in public actions that tend to the good and glory of their country, and the advancement of our service, as we cannot but take notice of them, though of the meanest condition. But much more of a person of your quality, who have been so near a Servant to our late deare Father of blessed memory. And seeing your Plantation in Newfoundland (as we understand by your letters) hath not answered your expectation, which we are informed you take so much to heart, (having therein spent a great part of your means,) as that you are now in pursuit of new countries, we out of our princely care of you, well weighing that men of your condition and breeding are fitter for other employment than the framing of new plantations, which commonly have rugged and laborious beginnings, and require much greater means in managing them, than usually the power of one private subject can reach unto, have thought fit hereby to advise you to desist from further prosecuting your designs that way, and with your first conveniency to return back to your native country, where you shall be sure to enjoy both the liberty of a subject and such respects from us as your former services and late endeavor do justly deserve.

Given at our Palace of White Hall this 22 of November, in the 5th year of our reign.

(Endorsed) *Copies of his Ma'ties letters to the Lord Baltimore as (2 equal copies) were brought to the L'd Viscount Dorchester by the Earle Marshall and the L'd President of the North. And by my Lord sealed with the signet the day of the date, 22d of November, '29.*

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STATE COLONIAL PAPERS, Vol. 4, No. 62.

(December, 1629.)

That whereas his Ma'ty was pleased at the humble suite of my sonne on my behalf, and upon your L'dsh'ppe honorable motion, to grant me the loane of the St. Claude for six months, that your Lordshipe would be pleased to procure a privy seal, for that purpose according to his Majesties gra- ious promise—

That your Lo'pp would also be pleased to procure me a letter from my Lords of the Counsell to the Governor of Virginia in favor of my wife, now there, that he would afford her his best assistance upon her return unto England in all things reasonable for her accommodation in her passage, and for recovery of any debts due unto me in Virginia, or for disposing of her Servants according to the custom of the country, if she shall think fit to leave any behind her, or upon any other occasion wherein she may have use of his lawful favor. And I shall acknowledge it as a great favor from your Lordships.

Moreover that your Lo'pp would be pleased to move his Ma'ty that whereas upon my humble suite unto him from New Foundland for a proportion to be granted unto me in Virginia, he was graciously pleased to signify by Sir Francis Cottington that I should have any suit, not already granted that his Ma'ty would give me leave to choose such a Part now, and to pass it unto me with the like powers and privileges as the King his father, of happy memory did grant me that precinct in New Foundland, and I shall contribute my best endeavors, with the rest of his loyal Subjects, to enlarge his empire in that part of the world by such gentlemen and others, as will adventure to join with me though I go not myself in person.

GEORGE BALTEMORE.

BOUNDARY OF MARYLAND AND VIRGINIA.

The following extracts are copied from the Virginia Code. —*I. D. Jones.*

Code of Virginia, 1849, p. 56, and 1860, p. 59 to 60, 3d Edition, 1874.

Documents in relation to the boundary between the States of Maryland and Virginia, obtained under resolution of the Virginia Assembly of 20th March, 1832, and the report relative to said boundary referred to in the resolution of 21st February, 1835—shall be preserved in the executive department as contemplated by said resolutions, and a copy shall be filed in the Board of Public Works.

1849, Virginia Code, Chapter 1, p. 48—"Of the Territorial Limits of Virginia, nature of the Compacts with adjoining States, and the Surveys, Charts and Map, made by authority of the State of its Territory."

Sec. 1. *Extent of Virginia under the Royal Government.*

1. Charter of 10th April, 1606, by James the First—1 Hen. Stat., p. 59, S. 4.

2. The Second Charter of James, 23d May, 1609—1 Hen. St., 88, S. 6.

3. The Third Charter of James, 12th March, 1611-12.

4. Under the Treaty with France of 1763, "a line drawn along the middle of the river Miss., Virginia's Western boundary:

And the people of Virginia, when they adopted their Constitution or form of government, on the 29th June, 1776, having, by the 21st section thereof, ceded, released and confirmed to the people of Maryland, Pennsylvania, North and South Carolina, such parts of the territory of Virginia as

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were contained within the charters erecting those Colonies, with all the rights in those parts which might theretofore have been claimed by Virginia, *except the free navigation* of the rivers Potomac and Pocomoke, with the property of the Virginia shore or strands bordering on either of the said rivers, and all improvements thereon; and having at the same time laid down in the said section that the Western and Northern extent of Virginia should in all other respects stand as fixed by the said Charters of James the First, granted in 1609, and by the said treaty of peace in 1763, unless by act of the legislature one or more territories should thereafter be laid off and governments established westward of the Allegany Mountains: The General Assembly of Virginia doth hereby declare that the territory of this Commonwealth and the boundaries thereof remain as they were after the said Constitution was adopted on 29th June, 1776, *except* only as follows, viz:

Cession of Territory Northwest of the river Ohio.

Sec. 2 recites Resolution of Virginia General Assembly, 2d January, 1781, that Virginia would, on certain conditions, yield, for the benefit of the United States, her right to the territory northwest of the river Ohio; and having, after the Act of Congress, 1783, passed a formal act on 20th Dec., 1783, authorizing the transfer to the United States of all right, as well of soil as of jurisdiction, which this Commonwealth had to the said territory, subject to the terms and conditions in the said Act of Congress; the deed of cession having been made accordingly, &c., &c., it is hereby declared that the said cession is to be deemed and taken according to the true intent and meaning of the acts and deed aforesaid.

☞ *And so far as the territory northwest of the river Ohio forms one of the boundaries of this Commonwealth, the said river, with the islands thereof, shall be considered as comprehended, and is hereby declared to be comprehended within the bodies of the several counties of this Commonwealth lying upon*

the said river; subject, however, to the provisions contained in the articles of Compact between Virginia and Kentucky.

Sec. 3. Boundary Line between Virginia and Pennsylvania.

Sec. 4. Boundary Line between Virginia and North Carolina.

Sec. 5. Boundary Line between Virginia and Tennessee.

Sec. 6. Boundary and Compact between Virginia and Kentucky.

Kentucky erected into a State and admitted into the Union as a member of the United States 4th February, 1791.

Sec. 7. Compact and Boundary between Virginia and Maryland.

At Mount Vernon, in Virginia, 28th March, 1785. The Compact declared to remain obligatory, except so far as it may have been superseded by the Constitution of the United States. Amongst the Articles of said Compact the 7th, 8th, 10th and 11th are incorporated in the Virginia Code.

Sec. 8. County of Alexandria was, by act of Virginia, 3d December, 1798, ceded to the United States, and retroceded to Virginia by act of Congress 9th July, 1846—is reannexed to Virginia.

Sec. 9. Map of the State, Charts of the Counties, and Geological Survey. Under provision of the act of 1815–16—p. 39, ch. 18—to provide an accurate Chart of each County, and a general Map of the territory of the Commonwealth, and the act amending the same, 9th January, 1817, a chart having been made of every County created before the 1st January, 1824, one copy of the chart of any such County shall remain with the Clerk of the County Court for the use of the County, as directed by the said acts, and another copy shall remain in the office of the Board of Public Works.

Materials and plates, under act of 14th February, 1825, to provide for engraving the Map, shall be under the control of said Board. A copy of each sized Map published under the act of March 9, 1827, shall likewise remain in the office of the Board.

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Virginia Code, 1849, Ch. 101. Title 29.

Fish—fixing gill-net, seine or obstruction below head of tide in Potomac or any of its branches, so as to injure the fisheries on said waters by preventing passage of fish, shall forfeit $20.

Not to fish in Potomac River or its tributaries in March, April, May or June, with nets or seines not laid out from, hauled to and landed upon the shores thereof, under a fine of $50 to $500.

Oysters and Terrapins.

1846-7, p. 71, Ch. 86.

If any person other than a citizen of Virginia shall take oysters or terrapins *in the waters thereof, or in the rivers Pocomoke and Potomac*, he shall forfeit $200.

But this section shall not extend to a citizen of Maryland taking oysters or terrapins in the said mentioned rivers.

Not to take oysters except with common oyster tongs, with a bar not exceeding 23 inches long.

Not to export oysters from 1st May to 1st September.

Laws on the subject of oysters very numerous—2 Rev. Co., p. 34—1819-20, 1831, 1832, 1833-4, 1835-6, 1839, '40, '41, '42, '43, '44, '45, '46, '47, '48, '49, &c.

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BOUNDARY LINE

BETWEEN THE STATES OF

MARYLAND AND VIRGINIA.

Before the Honorable JEREMIAH S. BLACK,
Honorable WILLIAM A. GRAHAM, and
Honorable CHARLES J. JENKINS,
Arbitrators upon the Boundary Line between the States of Virginia and Maryland.

WILLIAM PINKNEY WHYTE,
ISAAC D. JONES,

Counsel for the State of Maryland.

BEST AVAILABLE COPY

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To the Honorable Board of Arbitration, in the matter of Controversy relating to the divisional line between the States of Virginia and Maryland.

The States of Virginia and Maryland having made unsuccessful efforts to settle and adjust the boundary line between them, by Commissioners, appointed by these States, respectively, in 1858 and 1867, have, by the action of their legislatures referred to you, "the settlement and determination of the true boundary line" between them, and for the purpose of stating, briefly, what the State of Maryland considers that "true line" to be, the undersigned, the counsel for that state, regularly appointed by its Governor, respectfully submit the following, as the description of the line of boundary between the two States, viz: Beginning at low water mark at the divisional line between the two States of Virginia and West Virginia, upon the south-west coast or shore of the Potomac River: thence following the said River at low water mark, to all wharves and other improvements now extending or which may hereafter be extended, by authority of Virginia from the Virginia shore into the said river beyond low water mark: and following the said River around said wharves and other improvements to low water mark on the south-western side thereof; and following the said river in the same manner down to the easternmost angle of South's Point at the mouth of the said river, Potomac, where it flows into the Chesapeake Bay, thence across the Chesapeake Bay,

by a right line, to the centre of Cedar Straits between Tangier Sound, near the southern end of Watkins' Point; thence by a right line east to the Atlantic Ocean;—which description the undersigned expect to verify by proofs, in such form and at such times, as may be deemed proper and convenient by your Honorable Board.

ISAAC D. JONES,
WM. PINKNEY WHYTE,
Counsel for the State of Maryland.

June 26th, 1874.

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ARCHIVES OF MARYLAND

VOL. XII

JOURNAL AND CORRESPONDENCE

OF THE

MARYLAND COUNCIL OF SAFETY

JULY 7 — DECEMBER 31, 1776

PUBLISHED BY AUTHORITY OF THE STATE, UNDER THE DIRECTION
OF THE MARYLAND HISTORICAL SOCIETY

WILLIAM HAND BROWNE
Editor

BALTIMORE
MARYLAND HISTORICAL SOCIETY
1893

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[Steward to Council.] Original.

October 16th 1776.

Gentellman. As Captain Patterson boat is so near redey to sail, I thought it would be as well for him to com up in ffir redey to receve your orders which will be tomorrow as the large schooner could be got redey in a few days with six carig guns. If you would consent to swap two field Pises which you have in Anaplis for two hevee Pises that I tuck out of the Resolution. The large schooner is persed for ten three and two pounders but as wee are obliged to put in fore pounders six will be near equal in wait of mettal (the schooner is a fine vesell) there is some vessels on the sea shore to sell. If you want to buy one of them, and load them whare thay are the danger would be considrebell less to git them out than giting them out of the Bay. My son will inform you what sitiwation the vessell ar hear in, I hope you will not think me foward in atemting to dictate for you as I raley do not intend it but am redey to oblige you in evrey employmen you can set me about and am your most obed^{t} Humble Servt

Stephen Steward

[Peters and Richardson to Johnson.] Original

Geo: Town Octr 16th 1776

Sir

We presume to adress you as a member of our Convention on a matter which we think of the utmost importance to the Public in these times when dispatch at Ferrys is so very necessary, Coln^{l} George Mason is propriator of the Land on the South side of Potowmack and Rents his Ferry over to George Town which in Virg^{a} is established by Act of Assembly. We have also a Ferry on the Maryland side and our misfortune is that no Ferrys in Maryland are established by Law, this we apprehend occasions the evils we are about to complain of and which we hope our Convention with your assistance will remedy as far as you think it consistant with the Public good, our Ferry man has always been threatened by Coln^{l} Masons Tennant with a suit in Virginia for presuming to Land in or bring from Virginia any Person, so that we are to Reap no kind of advantage from our situation on Potowmac River it being wholy claimed by the State of Virg^{a} Yesterday our Ferryman was arrested we suppose at the suit of Coln^{l} Mason or his Tennant for this offence, tyed by the sherriff because he attempted to make his Escape and dragged to Fairfax Goal in Alexandria, to accomplish which the Sherriff came over to this side got the Maryland Boat to put him over

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desired the Ferryman to come on shore and he would pay him, which he did by serving the writ, so that the matter was concerted and with a design to prevent Maryland from having any Right to a Ferry over Patomac at all, but as to the Right we submit it to our Legislature to be determined at any future day yet when dispatch over Ferrys is at this time so very necessary for the Post and for Troops that may have occasion to pass as well as private Travellers we hope for immediate relief as to our Ferryman so far as it may be thought in the power of our Convention for it is notorious that unless he is Released our Passage over Potowmac either to the Southward or Northward will be very much obstructed, the Virginia Ferryman having no Boats, at least not a sufficient number for the purpose. We look upon this to be a matter of consequence and hope you will not neglect having done in it what you think right, at least so far as you have it in your power and we are very respectfully Sir

Your Most obed^{t} & H^{ble} Sev^{t}
Robert Peters
Tho Richardson

P. S. Since writeing the foregoing the Ferryman has been admited to Bail & is Returnd
The Honble Thomas Johnson

C. S. J. Thursday, Octr 17th 1776.

Council met. Present as on yesterday.

Ordered That Western shore Treasurer pay to Nich^{s} Hale for use of Jno Robert Hollyday ninety one Pounds, ten shillings & six Pence for Am^{t} Acc^{t}

Ordered That said Treasurer pay to Thos Contee nine Pounds nineteen shillings & six Pence for Am^{t} Acc^{t}

Copy of Letter N° 219 was sent to Mr Jacob Schley. N° 220 to Vernon Hebb & Timothy Bowes. N° 221 to George Wells

Ordered That Western shore Treasurer pay to John Barry for use of George Wells, four hundred Pounds, on Acc^{t} Row Gallies.

Adjourned 'till next Day 10 o'Clock.

C. S. C. No. 219. [Council to Schley.]

Sir.

We are in great want of the rifles which you were to furnish for the use of this State by the first day of August and desire you will immediately send them down to us.

Octr 17 1776

Mr Jacob Schley.

L-135

COMMONWEALTH of VIRGINIA

STATE WATER CONTROL BOARD
2111 Hamilton Street

JUL 8 1976

IN REPLY REFER TO: 5

Mr. Herbert M. Sachs, Director
Department of Natural Resources
State of Maryland
Water Resources Administration
Tawes State Office Building
Annapolis, Maryland 21401

Dear Mr. Sachs:

This is in response to your letter of February 17, 1976, seeking assurance that Virginia encourage the city of Fairfax to adhere to the strict riparian doctrine in using water from Goose Creek, a tributary of the Potomac River, and return the diverted water so it could again be available for use by Maryland and Washington, D.C.

While I can understand your concern in principal, a look at the hydrologic facts and realities involved seems to show that it may not be a great problem. Goose Creek is a stream that is wholly in Virginia and during low flows such as the 1-day/30-year low flow, very little water would naturally be provided to the Potomac River. The 1-day/30-year low flow from Goose Creek is about 250,000 gallons per day.

Our records indicate that during the most critical low flow record of recent years, during August and September 1966, daily low flows in Goose Creek were maintained at a daily average of 1.5 cfs for a number of weeks. This was at a time when the historic low flows in the Potomac were reported for one day at 606 cfs at gaging station 1=6465 on the Potomac River near Washington, D.C. I think we can be confident that flows greater than the natural 1-day/30-year low flow will be maintained during future droughts.

Virginia recognizes the need for regulation of stream flow to protect in-stream water uses and to satisfy water quality standards. Virginia does not have a permit system for allocation of water. Virginia courts presently determine what is reasonable use. Mr. George E. Hubler, Jr., City Manager, City of Fairfax, in his letter to you on February 25, 1976, indicates that the city

VA-Gen-00224

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JU 8 1976

-2-

Mr. Herbert Sachs

of Fairfax has permission from the appropriate Court of Record since 1968 to remove up to 45 million gallons per day from Goose Creek.

The city of Fairfax through the use of storage will be able to provide up to 15 million gallons of water per day from Goose Creek to supply northern Virginia communities. Increased storage in the Washington area should be encouraged not discouraged. Storage in this area will strengthen the water supply system and help provide for emergencies that may come to the Washington Metropolitan Area.

It should be stated for the record, that Virginia has not recognized the Maryland permit and appropriation authority for Virginia waters nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785.

Virginia is certainly interested in reaching a settlement concerning the allocation of water rights in the Potomac and we believe it should be based upon the provisions of the Compact of 1785. It is suggested that the natural flow allocation is the first order of business.

Based on such allocation, Virginia could resolve any problems on its tributaries or allocate its share of Potomac waters and Maryland could likewise resolve any problems on its tributaries or allocate its share of the Potomac waters.

Sincerely,

Eugene J. Jensen
Executive Secretary

/ltc

cc: Mr. James Corbalis
Mr. Dan Sheer
Mr. George Hubler

VA-Gen-00225

L-137

MEMORANDUM

State Water Control Board

2111 North Hamilton Street | P. O. Box 11143 | Richmond, VA. 23230

SUBJECT: August 16, 1976 Meeting about Potomac Water

TO: E. T. Jensen, R. V. Davis, A. H. Paessler, J. L. Bourassa

FROM: D. F. Jones D.F. Jones/NRI

DATE: August 17, 1976

COPIES: Secretary Earl Shiflet, NRO, J. Ryan

The meeting of August 16 in the NRO was attended by five men from the Maryland Water Resources Administration and four from SWCB. The meeting had been arranged through the efforts of Secretary Shiflet and Mr. Paessler to provide for a technical level discussion of differences with respect to H.R. 12215/ S. 3326. A copy of the attendance list is attached.

It was a good meeting with discussion of a wide range of technical issues. However, there was still a wide difference of views after the meeting. Stated bluntly, the positions still remain unchanged with Maryland's Attorney General maintaining that Maryland owns the Potomac and has the right to allocate water through their permit system: and with Virginia's position as expressed by SWCB Chairman Bourassa that Virginia has vested rights to Potomac Water and does not need to have an allocation permit from anyone to withdraw water. The positions seemed clear to everyone, however attempts were made to deal specifically with a bill(s) that would allow construction of the WSSC weir, allow the Corps, District of Columbia, Maryland and Virginia to enter into agreements for allocation of Potomac low flow and include other possible provisions. Each group is to attempt to develope drafts of bills that may hopefully be accepted by both Maryland and Virginia.

Mr. Jones discussed Virginia's viewpoint that Potomac water rights might be adjusted through exchange of dollars. He used as an illustration, a value of $.0765 per thousand gallons (a figure derived from Maryland's estimate of value of water to the Potomac supply from the Dickerson proposal of advanced wastewater treatment) and indicated that for a low flow of 444 mgd a value of over $12 million per year was involved and could possibly be a basis for accumulating funds for water resource projects. An attached sheet shows the basis of these figures.

It appeared that the meeting ended with a good feeling of professional respect for each other.

Attachments

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Potomac Water Supply
Meeting 16 August 76

NAME	ORGANIZATION	Telephone No.
Kirsch T.C.	Va. SWCB	750-9111
Al DIETERICH	WRA-Md	267-5675
Robert Sachs	WRA-Md	267-5846
Norman Howard	Va SWCB Bd	786-1411
Dale F. Jones	Va. SWCB	786-141
THOMAS M. SCHWARBERG	VASWCB	(703) 750-9111
Ernest C. Rebuck	WRA-Md	267-5675
JOHN W VUKOVICH	WRA-Md.	267-5675
Thomas A. Deming	WRA-Md	267-5821

VA-Gen-00229

L-139

COMMONWEALTH of VIRGINIA

STATE WATER CONTROL BOARD
2111 Hamilton Street

Eugene T. Jensen
Executive Secretary
Post Office Box 11143
Richmond, Virginia 23230
(804)786-1411

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Kenneth B. Rollins
M. Allen Wright

September 7, 1976

Honorable Mike Gravel, Chairman
Subcommittee on Water Resources
Committee on Public Works
Senate of the United States
Washington, DC 20013

Dear Senator Gravel:

On August 5, 1976, representatives of Maryland and Virginia appeared before your Subcommittee to testify on S.3320, a bill to authorize both construction by the Washington Suburban Sanitary Commission of a water diversion structure on the Potomac River and a low flow allocation agreement. Although the two States agreed on the urgent need for enactment of the Bill, there were some differences which had to be resolved between us.

Representatives of Maryland and Virginia have met on several occasions since appearing before your committee. We are pleased to report that we are now in agreement to recommend legislation. Our proposed revisions to the Bill are attached.

We believe it is most urgent that enabling legislation be passed by the present Congress and we solicit your assistance in obtaining enactment. Representatives of our respective organizations will be pleased to meet with you or your staff to discuss any details.

Your hearings were most helpful in identifying issues and, we believe, have been instrumental in achieving agreement between the States.

Sincerely yours,

Maryland _____
Herbert M. Sachs, Director
Maryland Water Resources Administration

Virginia _____
Col. J. Leo Bourassa, Chairman
State Water Control Board

/wb

VA-Gen-00231

L-140

COMMONWEALTH of VIRGINIA

STATE WATER CONTROL BOARD
2111 Hamilton Street

Eugene T. Jensen
Executive Secretary
Post Office Box 11143
Richmond, Virginia 23230
(804)786-1411

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Kenneth O. Wallin
R. Allen Wright

September 7, 1976

Honorable Ray Roberts, Chairman
Subcommittee on Water Resources
Committee on Public Works and Transportation
2167 Rayburn House Office Building
Washington, DC 20013

Dear Mr. Chairman:

On August 5, 1976, representatives of Maryland and Virginia appeared before your Subcommittee to testify on HR12215, a bill to authorize both construction by the Washington Suburban Sanitary Commission of a water diversion structure on the Potomac River and a low flow allocation agreement. Although the two States agreed on the urgent need for enactment of the Bill, there were some differences which had to be resolved between us.

Representatives of Maryland and Virginia have met on several occasions since appearing before your committee. We are pleased to report that we are now in agreement to recommend legislation. Our proposed revisions to the Bill are attached.

We believe it is most urgent that enabling legislation be passed by the present Congress and we solicit your assistance in obtaining enactment. Representatives of our respective organizations will be pleased to meet with you or your staff to discuss any details.

Your hearings were most helpful in identifying issues and, we believe, have been instrumental in achieving agreement between the States.

Sincerely,

Maryland _____
Herbert M. Sachs, Director
Maryland Water Resources Administration

Virginia _____
Col. J. Lee Scarsella, Chairman
State Water Control Board

/ws

Attachment

VA-Gen-00232

L-141

(See Attachment A)
94th Congress
2nd Session

H.R. 12215

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To authorize the construction of a water diversion structure on the Potomac River, Maryland, subject to execution of an agreement providing for equitable allocation of available water during the low flow periods of the Potomac River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes os Section 9 of the Act of March 3, 1899 (30 Stat. 1151, 33 U.S.C. 401), the consent of Congress is granted to the Washington Suburban Sanitary Commission to construct a water diversion structure, approximately 545 feet in length, in the Potomac River between the Washington Suburban Sanitary Commission's water filtration plant and Watkins Island, except that the structure authorized by this section may not be constructed until the Department of the Army, (acting through the Corps of Engineers), the State of Maryland, the Commonwealth of Virginia, the Washington Suburban Sanitary Commission, and such other governmental authorities as the Department of the Army, the State of Maryland, and the Commonwealth of Virginia deem desirable signatories, have entered into a written agreement providing for an enforceable schedule for the allocation and withdrawal of water by any entity during periods of low flow from that portion of the Potomac River located between the Little Falls Dam and the farthest upstream limit of the pool of water behind the Seneca Dam.

Sec. 2. The Secretary of the Army, acting through the Chief of Engineers, is authorized to enter into the agreement referred to in the first section of this Act and any amendment to or revision of such agreement.

Sec. 3. Except as may be provided in the agreement referred to in the first section of this Act, nothing in this Act shall alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, the Commonwealth of Virginia, or any political subdivision thereof, the District of Columbia, or the Corps of Engineers existing on the date of enactment of this Act relative to the appropriation of water from, or the use of, the Potomac River.

L-143

J. GLENN BEALL, JR.
MARYLAND

COMMITTEES:
BUDGET
COMMERCE
LABOR AND PUBLIC WELFARE
SENATE SELECT COMMITTEE ON SMALL BUSINESS
SPECIAL COMMITTEE ON AGING

United States Senate
WASHINGTON, D.C. 20510

September 30, 1976

Honorable Mike Gravel, Chairman
Subcommittee on Water Resources
Senate Public Works Committee
United States Senate
Washington, D. C.

Dear Mr. Chairman:

We are taking this opportunity to urge the Senate Conferees to stand firm on the inclusion of Section 11 in the "Water Resources Development Act of 1976" (S. 3823) when it goes to conference this week.

As you may know, after full hearings in the Senate Subcommittee on Water Resources, this provision was adopted and approved by the Senate, the purpose of which is quite simple. It authorizes the Washington Suburban Sanitary Commission, entirely at its own expense, to construct a water intake structure (weir) across a portion of the Potomac River near Watkins Island; provided, that a low flow allocation agreement is first executed by the Corps of Engineers, the State of Maryland and the Commonwealth of Virginia to ensure the equitable allocation of available water during low flow periods along the Potomac. Although not stated in the bill, prior to construction all environmental considerations would be handled pursuant to the National Environmental Policy Act, the Federal Water Pollution Control Act, and any other applicable federal or state statute.

The provisions of Section 11 were included at the insistence of the Army Corps of Engineers and now has the full support of both Virginia and Maryland. It must be emphasized, however, that such support came only after months of intensive negotiations between the two states; and, indeed, represents a small, but significant stepping stone toward further agreement on problems concerning the overall solution to providing a dependable water supply for the entire Washington Metropolitan Area.

The fact that Maryland and Virginia have for literally hundreds of years feuded over the use and control of the Potomac River makes the recent accord by the two states all the more significant. But, if the weir and low flow allocation agreement provisions are not passed, there will be

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no accord resulting in many more years of delay in resolving problems along the Potomac. Therefore, we seek your support in ensuring that the House agree to include Section 11 in the final bill.

If you have any questions concerning this matter, Tim Miller (Ext. 4-4524) of Senator Beall's staff will be pleased to answer them.

Sincerely yours,

Charles McC. Mathias, Jr.

J. Glenn Beall, Jr.

Harry F. Byrd, Jr.

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Commonwealth of Virginia

ANTHONY F. TROY
ATTORNEY GENERAL

D. PATRICK LACY, JR.
CHIEF DEPUTY ATTORNEY GENERAL

RENO S. HARP, III
WALTER A. McFARLANE
STUART H. DUNN
JAMES E. RYAN, JR.
DEPUTY ATTORNEYS GENERAL

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

July 29, 1977

RECEIVED
STATE WATER
CONTROL BOARD

Mr. R. V. Davis
Executive Secretary
State Water Control
Board
Post Office Box 11143
Richmond, Virginia 23230

Re: Potomac River Riparian Rights

Dear Mr. Davis:

After the meeting of the State Water Study Commission on July 27, 1977, you asked for my opinion on the following questions:

1. Does the State Water Control Board, or any other state agency, have authority to issue permits for allocating the waters of the Potomac River?

2. Does the Potomac River Low Flow Agreement signed by Virginia, Maryland, and the Washington Suburban Sanitary District, but not yet signed by the Corps of Engineers, diminish Virginia's riparian rights in the Potomac River?

In answer to the first question, I know of no authority for the State Water Control Board, or any other state agency, to require permits for the use of the waters of the Potomac River or to allocate such waters.

To answer the second question, some background is necessary. A number of years ago the state of Maryland enacted a permit system for the use of all waters within Maryland. See §§ 8-801, et seq. of the Natural Resources

Article of the Annotated Code of Maryland. The state of Maryland owns the entire Potomac River bed south to a line established by the Mathews-Nelson Survey. This line follows the low water mark of the south shore of the Potomac, but runs from headland to headland rather than following the indentations of the coast. Thus Virginia's ownership of the bed of the Potomac River extends only to the low water mark except for certain bays. Virginia also has full riparian rights to use of the Potomac River. See Article VII, § 1, of the Potomac River Compact with Maryland, § 28.1-203 of the Code of Virginia (1950), as amended.

Maryland asserts that because it owns the bed of the Potomac River it has the authority to require anyone taking water from the Potomac River to secure a Maryland permit. Under the concept of riparian law, any riparian owner can make a reasonable use of the river. To the extent that Maryland requires permits of Virginia riparians, it is restricting the normal exercise of their riparian rights and thus infringing on Virginia's riparian rights.

While the language of the low flow agreement itself is ambiguous as to the relationship of the Maryland permit program to the Virginia riparian owners, the fact that the county of Fairfax has accepted a permit from Maryland and this action has not been challenged by the Commonwealth, and that the Low Flow Agreement was drafted with full knowledge of that fact, could lead to an inference that the Commonwealth has acquiesced in the Maryland permit program. It could thus be said that Virginia acquiesced to the diminution of her riparian rights to the extent of the Maryland permit program.

It should be noted that acquiescence to the infringement of one's right can lead to its loss. The Black-Jenkins boundary arbitration of 1877 held that length of time which raises a right by prescription in private parties also raises such a presumption in favor of States. It awarded Virginia title to the south shores of the Potomac River to the low water line on the basis that Virginia had exercised dominion to the low water mark as if she owned it, and thus acquired rights to it through prescription. This rationale was followed by the Supreme

Court in Maryland v. West Virginia, 217 U.S. 577 (1910).

To avoid any inference of Virginia's acquiescence to a diminution of its riparian rights, the Low Flow Agreement should be amended. The amendment could be a simple statement that "nothing in this agreement shall be deemed to in any way affect riparian rights to the Potomac River except as explicitly provided." The insertion of the wording from the savings clause (§ 181(c)) of the Water Resources Development Act of 1976 which was proposed in the response to the counteroffer from the Corps of Engineers could also be used to achieve the same effect. That wording reads as follows:

> Except as expressly provided herein, nothing in this Agreement shall alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, the Commonwealth of Virginia, or any political subdivision thereof, or the District of Columbia, or authority of the Corps of Engineers existing on the date of this Agreement relative to the appropriation of water from, or the use of, the Potomac River.

In my opinion, however, such an amendment to the Low Flow Agreement, unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, in time, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system. Since some permit system for the Potomac is probably needed, the Boardshould consider recommending that the General Assembly assert Virginia's continued intent to claim its riparian rights to the Potomac by enacting and enforcing its own permit system.

With kindest regards, I remain

Very truly yours,

Frederick S. Fisher

Frederick S. Fisher
Assistant Attorney General

FSF:lgw

L-148

MEMORANDUM

TO: Members of the State Water Control Board

FROM: Frederick S. Fisher

RE: Letter to Maryland Concerning the Permit Program for the Potomac River

DATE: August 4, 1977

Attached is a proposed letter to Mr. Herbert Sachs, the Maryland Director of Water Resources, which I drafted pursuant to the agreement reached in the conference call of August 2, 1977. As discussed then, because the Low Flow Agreement recognizes the Maryland permit system and was drafted with full knowledge that Fairfax County had submitted thereto, it provides some evidence that Virginia acquiesces in Maryland's exercise of authority over Virginia's use of the Potomac, although admittedly there is language in the Agreement which could be taken as an indication to the contrary. I suggested that the Agreement be amended to state that it was not to be considered as a waiver of any riparian rights except as specifically stated. For various tactical and strategic reasons, the members of the Board on the conference call decided not to amend the Agreement, but rather to attack the problem of Virginia's seeming acquiescence by means of the attached letter.

VA-SRC-001326

The background of this problem is as follows:

Maryland owns the bed of the Potomac River south to a line running along the low water mark on the Potomac's south shore. Virginia, under various compacts, retains full riparian rights to use the River. Some years ago Maryland enacted a Water Resource Management statute which requires anyone withdrawing any Maryland waters, including the Potomac, to secure a permit. Requiring a riparian owner to get a permit to exercise his right to make a reasonable use of a river is a restriction on his riparian rights. There is no question about Maryland's authority to restrict the riparian rights of its own citizens. However, there is a substantial question as to whether Maryland has any authority to restrict the riparian rights of Virginians.

For some time no Virginia locality was interested in using the Potomac River. In recent years, however, the county of Fairfax and the Town of Leesburg have both secured a Maryland permit.

In my opinion, under the compacts giving Virginia riparian rights in the Potomac River, Maryland does not have any authority to require permits from Virginia riparians. But Maryland is exercising that right. If Maryland continues to require permits of Virginia localities, and if its permit program is not challenged

by Virginia, in time Maryland will acquire by prescription the right to require a permit from Virginia riparian users. Prescription has worked along the Potomac before. Although Maryland was originally granted the bed of the Potomac River to the high water mark along the south shore, Virginia acquired the ownership of the shore down to the low water mark by prescription, since throughout history Virginians exercised jurisdiction over that strip of land as if they owned it. See Maryland v. West Virginia, 217 U.S. 577 (1910).

The purpose of this letter is to provide evidence in a written document that Virginia is aware of its rights and intends to protect them. In the attached letter, the State Water Control Board, speaking for the Commonwealth, authorizes Maryland to operate a permit program on behalf of Virginia, in effect as its agent. The letter also serves notice that at some point Virginia may wish to operate its own permit system for the use of Potomac water in Virginia.

Because the Water Board lacks authority to require permits itself, there is a good question how it could grant this authority to others. However, under § 62.1-44.41 of the Code of Virginia (1950), as amended, the Board is authorized to speak for the State:

> In all matters directly related to conservation or use of the State's water resources, except as otherwise provided by law, the Board is authorized to speak and act for the State in all relations with the federal government or with the government of other states or with interstate agencies or authorities directly concerning conservation or use of the State's water resources.

In actuality the Board, speaking on behalf of the Commonwealth, is agreeing to allow Maryland to issue permits to those Virginia riparians who voluntarily submit to the Maryland system. Since we believe that Maryland cannot compel Virginia riparians to get a permit, any permit issued by Maryland must be voluntarily accepted by the Virginia applicant. However, there is some question about how voluntary such acceptance is, since the alternative would be exposure to legal challenges by the state of Maryland. For this reason, Virginia localities have prefered to get a permit rather than expose themselves to the delay and uncertainty of litigation.

It appears that a permit system is needed for the Potomac River, that Maryland has a workable permit system, and that Maryland's system is being administered in a way which is fair to Virginians. For Virginia to set up its own permit system just for the Potomac River would probably be costly, and would require an agreement as to what share of the flow of the Potomac River each State was entitled to use. Failing agreement, allocation of the Potomac's waters would have to be made by the courts.

It may very well be that a continuation of the present Maryland permit system is in the best interest of Virginia until Virginia adopts a statewide system, provided it does not compromise any of Virginia's rights to the water. If, after study, it is concluded that the Maryland permit system is the best way to go, a more formal act by the General Assembly may be desirable. Such an act might specify that Maryland could issue permits on behalf of Virginia until further action by the General Assembly.

FSF:lgw

Attachment

L-153

COMMONWEALTH of VIRGINIA

STATE WATER CONTROL BOARD
2111 Hamilton Street

R. V. Davis
Executive Secretary

Post Office Box 11143
Richmond, Virginia 23230
(804)786-1411

BOARD MEMBE
Warren L. Brau
Chairman
Col. J. Leo Bourg
Vice-Chairman
George M. Corne
Roy B. Martin, J
Millard B. Rice, J
Kenneth B. Rolli
R. Alton Wright

August 5, 1977

Mr. Herbert M. Sachs, Director
Water Resources Administration
Tawes State Office Building
Annapolis, MD 21401

Dear Herb:

On several occasions you have pointed out that Virginia does not have a permit program for the Potomac, that the Potomac needs a permit system because of the large demand for its water, and therefore that Maryland has operated its permit system for users on both sides of the River.

As we discussed, the State Water Control Board, on behalf of the Commonwealth, is agreeable to your continued operation of the permit system in the interest of the riparian owners on both sides of the River. However, as you may know, our General Assembly has appointed a Water Study Commission to review with the State Water Control Board the problems of water supply in Northern and Southeastern Virginia. It is possible that an outcome of the study would be a recommendation to the General Assembly that Virginia adopt its own permit system.

In the event that the General Assembly should authorize a permit system, we would expect to issue permits to all political sub-divisions in the Commonwealth and coordinate all of these permits between Virginia and Maryland, as you and I have previously discussed during our deliberations on the Potomac Low Flow Agreement.

Thank you for your cooperation.

Very truly yours,

J. Leo Bourassa
Vice Chairman, State Water Control Board

JLB:ay
cc: James Coulter, Board Members

L-154

COMMONWEALTH of VIRGINIA

Office of the Governor
Richmond 23219

Mills E. Godwin, Jr.
Governor

December 30, 1977

EXHIBIT
30
SACHS

The Honorable Blair Lee, III
Governor of Maryland
State House
Annapolis, Maryland 21404

The Honorable Clifford L. Alexander, Jr.
Secretary of the Army
The Pentagon
Washington, D. C. 20310

The Honorable Walter E. Washington
Mayor, District of Columbia
Washington, D. C. 20004

Dear Sirs:

I have reviewed the December 15th draft of the "Potomac River Low Flow Allocation Agreement" with representatives of the State Water Control Board and the Attorney General, and I have received their comments and recommendations.

We have made it clear from the outset of these negotiations that Virginia places a high value on her riparian rights in the Potomac River, and that she will not agree to any diminution in what she views to be her fair share of that River's natural flow. It is not evident from a review of the subject draft that Virginia will receive her fair share without resort to future litigation, and accordingly, I must hold that issue under advisement while we seek resolution of the several other respects in which the agreement is unsatisfactory to us. The attachment hereto contains the language which must be included in the agreement in order to remove our concerns. While the points made in this language are very important to Virginia, none appears to prejudice any proper interest of another party. Accordingly, I am hopeful that agreement can be reached on inclusion of this language by January 14, 1978, which is the last day of my term as Governor. The Attorney

General has advised me that appropriate members of his staff will be available to participate in completion of this task by that date. I will make a decision before that date on whether the agreement provides Virginia with her fair share of the River's natural flow.

Sincerely yours,

Mills E. Godwin, Jr.

Attachment

CC: The Honorable John F. Herrity, Chairman
Fairfax County Board of Supervisors

Mr. Frederick S. Morin, Chairman
Fairfax County Water Authority

The Honorable Robert S. McGarry, Chairman
Washington Suburban Sanitary Commission

Colonel J. Leo Bourassa, Vice-Chairman
State Water Control Board

BEST AVAILABLE COPY

L-156

ATTACHMENT

The Honorable Clifford L. Alexander
The Honorable Blair Lee, III
The Honorable Walter E. Washington
December 30, 1977

REQUIRED MODIFICATIONS TO THE "POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT," (draft), dated December 15, 1977.

1. "3. H. In any suit brought seeking a judicial determination of rights to use the Potomac River, as contemplated by Article 2, Section C. 3, the parties to this Agreement hereby waive their respective rights to assert in any such suit that, by signing this Agreement, any party has waived any of its riparian or other rights to use the waters of the subject portion of the Potomac River, or that any party, by signing this Agreement has, by passage of time, gained defenses that would not be assertable on the effective date hereof."

2. "1. J. Each of the parties hereto waives such immunity as it may have to the extent necessary to permit maintenance in a federal court of an action by the Moderator or another party to enforce the terms and provisions of this Agreement. Nothing contained herein shall be deemed to be a waiver of any immunity any party may have from any suit or other action by the Moderator or another party which seeks monetary damages."

3. "3. I. Each of the parties hereto agree that any legal action brought hereunder, or relating to the subject matter hereof, by the Moderator or by any party hereto, shall be instituted and maintained in the District Court for the District of Columbia, if such court has the power to hear such action, and each party hereby consents to venue being laid in said court and service of process upon it from that court. Nothing herein shall be construed to preclude any party from instituting and maintaining any legal action in the United States Supreme Court."

4a. "3. C. After the last semicolon: 'nor restrict or limit any such authority as the Commonwealth may have;'...."

4b. "3. G. "If Virginia enacts and implements a permit system to regulate the use by its riparian political subdivisions and citizens of the subject portion of the Potomac River, its permitees shall have all rights and shall be covered by this Agreement to the same extent as the permitees of the Administration."

5. Replace the word "allocation" appearing in the third line of Section C6 of Article 5 with the words "water supply."

6. Article 6, new paragraph:

"Notwithstanding any provision in this Agreement to the contrary, the Commonwealth shall not be bound by any provision hereof unless and until she, or one of her political subdivisions, receives, within one year of her execution hereof, a permit which authorizes the construction of a water intake structure by which water may be withdrawn during all low flow periods as contemplated herein."

STATUTES AT LARGE

OF

VIRGINIA,

FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, INCLUSIVE,

IN THREE VOLUMES,

(NEW SERIES,)

BEING A CONTINUATION OF HENING.

VOL. II.

BY SAMUEL SHEPHERD.

RICHMOND:
PRINTED BY SAMUEL SHEPHERD.
1835.

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trustees, to be by them, or a majority of them, laid off into lots of half an acre each, with convenient streets, and established a town by the name of Vanceyville:

"That the lots and streets, as the same are already laid off by Bethel Starke, the proprietor thereof, at Hicks's ford, in the county of Greensville, shall be established a town by the name of Belfield; and Thomas Cocke, William Machin, John Blunt Turner, William W. Wilkins, John Goodwin, and John Camp, gentlemen, constituted trustees thereof.

2. So soon as the said lands, where the same hath not already been done, shall respectively be laid off into lots, the trustees thereof, and also of the said towns of Buckland, Smithfield, and Belfield, shall proceed to sell the same at public auction, for the best price that can be had, the time and place of such sales being respectively advertised for two months successively, previous thereto, in some one of the newspapers within this commonwealth, and to convey the said lots to the purchasers in fee, subject to the condition of building on each, a dwelling house equal to twelve feet square at least, with a brick or stone chimney, to be finished fit for habitation within seven years from the day of sale, and pay the money arising from such sales to the proprietors of the said lands respectively, or their legal representatives: *Provided always*, That nothing herein contained, shall be construed to authorize the trustees of the towns of Buckland and Smithfield, in the counties of Fauquier and Prince William, to sell any lots on which the proprietors of the lands shall have built a house.

3. The trustees of the said towns respectively, or a majority of them, are empowered to make such rules and orders for the regular building of houses therein, as to them shall seem best, and to settle and determine all disputes concerning the bounds of the lots.

4. If the purchaser of any lot in either of the said towns shall fail to build thereon, within the time limited in his deed of conveyance, the trustees of the said town, where the lot has been sold by them, and where such failure happens, may thereupon enter into such lot, and sell the same again, and apply the money for the benefit of the inhabitants of the said town. Vacancies by death or otherwise, of any one or more of the trustees of the said towns respectively, shall be supplied in manner prescribed by an act of assembly, passed in the year one thousand seven hundred and seventy-eight, intituled, "*An act to empower the freeholders of the several towns not incorporated, to supply the vacancies of the trustees and directors thereof.*"

5. This act shall commence and be in force from and after the passing thereof.

CHAP. 60.—An ACT extending the jurisdiction of the mayor and commonalty of the town of Alexandria, and for other purposes.

[Passed January 8, 1798.]

Whereas by an act of assembly, passed in the year one thousand seven hundred and ninety-six, intituled, "*An act adding to the town of Alexandria, certain lots contiguous thereto, and for other purposes therein mentioned,*" it is enacted, "that certain improved lots, and all others as they become so improved, within the bounds in the said act mentioned, be added to and made part of the said town of Alexandria," thereby leaving out of the jurisdiction of the

mayor and commonalty of the said town, the unimproved lots within the limits aforesaid, as long as they shall so remain unimproved, by which means the prosperity of the said town is in a great degree prevented:

1. *Be it therefore enacted*, That the unimproved lots within the limits aforesaid, shall be, and are hereby incorporated with, and considered as a part of the said town of Alexandria, and subject to the same regulations as the other parts thereof.

Unimproved lots in Alexandria incorporated with other parts thereof.

2. The mayor and commonalty of the said town, are hereby authorized and empowered, whenever they may deem it proper, to open, extend, regulate, pave and improve the streets of the said town: *Provided however*, That they shall make to every person or persons injured by the extension of any of the said streets, such compensation out of the funds of the corporation, as to the said mayor and commonalty shall appear to be just.

Powers of the mayor, &c. over streets.

Proviso.

3. And whereas the inhabitants of the said town sustain considerable inconveniences, and the interest and prosperity thereof are much impeded, in consequence of the erection of a rope walk by a certain Charles Alexander, and now leased to Joseph Harper and Samuel G. Harper, extending across sundry streets of the said town: *Be it therefore enacted*, That it shall and may be lawful for the court of Fairfax county, and it is hereby empowered and required, on application of the said mayor and commonalty, to direct its clerk to issue a writ in the nature of a writ of *ad quod damnum*, to be directed to the sheriff of that county, commanding him to summon and impannel twelve fit persons, being freeholders, residing within his county and without the limits of the said town, to meet upon the land at or near the said rope walk, on a certain day to be named by the court, and inserted in the said writ, of which reasonable notice shall be given by the sheriff, to the said Joseph Harper and Samuel Harper.

A rope walk within the limits of the town to be discontinued.

Jury of inquest to be summoned, &c.

4. The said freeholders on appearing, shall be charged by the said sheriff, on their oaths, impartially and to the best of their judgment, to view the premises, and to say to what damage it will be to the proprietor or tenants thereof, to remove the said rope walk and its appurtenances.

Jury shall be sworn to act impartially.

5. The inquest so made and sealed by the said jurors, together with the writ, shall be returned by the said sheriff to the succeeding court, and a copy thereof transmitted by the clerk to the mayor and commonalty of the said town, who shall thereupon order the damages found by the jury to be paid to the party or parties entitled to the same, and after payment or a tender thereof, it shall be lawful for the said mayor and commonalty to remove the said rope walk, and all other obstructions occasioned by the erection thereof.

Inquest to be returned and compensation to the proprietor, how made, &c.

6. *And be it further enacted*, That the jurisdiction of the mayor and commonalty of the said town, shall extend to all vessels lying at any wharf, projecting from the said town; and also to all vessels made fast to others lying at the wharves, or in the docks, or waters within the wharves.

Jurisdiction of the mayor, &c. extended to vessels lying at wharves, &c.

7. This act shall commence and be in force from and after the passing thereof.

Commencement.

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C. 237.

An act, to reduce into one, the several acts for the settlement and regulation of Ferries.

A. D. 1819.
A. R. C. 43

[Passed January 30, 1819.]

1. *Be it enacted by the General Assembly.* That ferries be constantly kept at the places herein-after mentioned, and at the rates annexed to each ferry; that is to say:

Ferries established, and rates of ferriage over Chesapeake.

Over the Bay of Chesapeake;

From the lands of Peter Bowdoin, on Hungar's creek in the county of Northampton, to the towns of Norfolk, Hampton and York, for a man or horse, passing singly, five dollars; for a man or horse, if there be more than one, three dollars; for every coach, chariot, or waggon, and the driver thereof, the same as for five horses; for every two-wheeled chaise or chair, the same as for two horses:

From the lands of Henry Parker on Pungoteague creek in the county of Accomack, to the towns of Hampton, York and Norfolk, the rates of ferriage to be in all respects the same as those prescribed and allowed at Bowdoin's ferry aforesaid.

2. And, if more shall be demanded and received, at either of the aforesaid ferries, the keeper or proprietor, as the case may be, of the ferry at which more shall be demanded and received, shall forfeit and pay to the person over-charged, the ferriage demanded and received, and twenty dollars for every such offence. Two boats shall be constantly kept at each of the aforesaid ferries, of at least twenty-five tons burthen, the captains of which shall be white persons. And, if the said boats are not kept in constant readiness, in manner aforesaid, for the transportation of persons and things, all the privileges granted hereby shall be void and cease: 'Provided, however, That the proprietor or keeper of neither of the aforesaid ferries, shall be compelled to send two boats across the Chesapeake bay, to the same place, on the same day; nor shall two boats belonging to the same ferry, be compelled to leave either the town of Norfolk, Hampton or York on the same day.'

Penalty for demanding and receiving more than legal rates.

Dimensions of boats.

Captains to be white persons.

By what neglect, privileges hereby granted shall be forfeited.

Proviso.

Further proviso.

3. 'It shall not be lawful for the proprietor or keeper of Bowdoin's ferry to land at, or take from, any creek, shore or point in the county of Accomack, any passenger or passengers; nor for the keeper or proprietor of Parker's ferry to land at, or take from, any creek, shore or point in the county of Northampton, any passenger or passengers. And either of the said keepers or proprietors offending herein, shall forfeit and pay to the other, the sum of twenty dollars, to be recovered by warrant before a justice of the peace.'

Keeper of ferry in Northampton not to take passengers from any creek in Accomack; and vice versa.

Penalty.

How recoverable.

4. 'It shall not be lawful for any person of the counties of Accomack and Northampton, for any reward or promise

Other persons prohibited from setting over passengers.

* The amendments made at the late revisal, are distinguished by being printed within single inverted commas. Former general law touching this subject; 1792, edi. 1794, 1803, and '14, c. 116.

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A. D. 1819. A. R. C. 43.

thereof, to set over the Chesapeake bay, to either of the said towns of Norfolk, Hampton or York, or other place adjacent to either of the said towns, any person or persons, their horses or carriages; and any person offending herein shall forfeit and pay, for every such offence, the sum of twenty dollars to the keeper or proprietor of the ferry injured thereby, to be recovered by such keeper or proprietor by warrant before a justice of the peace.'

Penalty.

How recoverable.

Ferry keeper to give bond and security; where and when.

5. 'THE proprietor or keeper of each of the aforesaid ferries shall, within one month after the commencement of this act, give bond with one security, in the court of the county wherein such ferry is, in the penalty of five hundred dollars, payable to the then sitting justices and their successors, with condition that he will keep his boats or packets in complete order in their hull and rigging; keep the cabins, and the beds and bedding used therein, in cleanly and comfortable order; keep sober and skilful captains and hands to navigate said boats; and that he will, in all things, so keep or cause to be kept his boats or packets, as to conduce to the comfort and safety of passengers. And any person injured or suffering by the breach of any of the said conditions, may commence and prosecute a suit on such bond, against the parties, or either of them, therein bound, their executors or administrators, or the executors or administrators of either of them, and shall recover the full penalty of said bond; and such bond shall not become void upon the first recovery, or if judgment shall be given against any plaintiff or plaintiffs, who shall sue upon such bond; but may be put in suit and prosecuted, from time to time, by any person or persons injured, or who may have suffered by the breach of any part of the condition thereof. And, where a recovery cannot be had upon such bond, except by the evidence of the person injured or aggrieved, the said bond may still be sued on by such person, who is hereby in such case declared to be a competent witness, and the whole recovery to go to the Commonwealth for the benefit of the literary fund.'

Condition.

Such bond how suable.

Evidence of person injured admissible.

Recovery in that case, how appropriated.

Penalty for failing to execute bond.

6. 'IF the proprietor or keeper of either of the aforesaid ferries shall fail or neglect to execute such bond within the time aforesaid, the court of the county, wherein such ferry is, shall impose a fine of ten dollars, upon such owner or proprietor, for every month's failure or neglect. And, whenever the principal obligor or security in any such bond shall die, or the principal obligor shall cease to be proprietor or keeper of such ferry, it shall be the duty of the court of that county, in which such ferry may be, to cause a new bond to be executed, in the same manner, and with the like conditions, as directed and required by this act. And, where any proprietor or keeper of such ferry, shall fail or neglect to renew his bond upon the death of the security, or where any succeeding proprietor or keeper shall fail or neglect to execute such bond, as is required by this act, he shall forfeit and pay a fine of ten dollars, for every month's failure or neglect, to be imposed by the court of the county in which the ferry of such proprietor or keeper is: *Provided*, That, in all cases, the proprietor or keeper shall be first summoned to shew cause, if any he can

New bond, &c., when to be taken.

Penalty for failing to execute such new bond.

Proviso.

'why such fine should not be imposed. All fines imposed by 'virtue of this section shall be applied towards lessening the 'county levy of that county, in which they may be imposed.'

A. D. 1819. A. R. C. 43.

Penalties imposed by this section, how appropriated. What other provisions of this act do not, and what do, apply to said ferries.

'7. 'NONE of the provisions contained in this act shall be 'construed to extend to either of the aforesaid ferries, unless 'where they are expressly named; except the provisions con- 'cerning expresses on public service, and the privileges and 'immunities of ferry keepers, and attendants at ferries, in 'consideration of setting over public messengers; all of which 'provisions are hereby declared to attach to the aforesaid 'ferries.'

Over Potowmac and its branches.

8. *Over Potowmac River and its Branches.*

	For a Man. CENTS.	*For a Horse.* CENTS.
From Henry Ashton's to Cedar Point, Maryland,	42	42
From Thomas Rowe's to Cedar Point,	42	42
From Hooe's to Cedar Point,	50	50
From Lawrence Washington's to Maryland, opposite,	42	42
From Boyd's hole to Maryland, opposite.	42	42
From the land of Gustavus Scott in Stafford, to Kennedy's in Maryland,	33	33
From Newport in Prince William, to Chamberlayne's in Maryland,	50	50
From the town of Carbury to Brook's in Maryland,	25	25
From William Clifton's to Wallis's in Maryland,	17	17
From Hereford's in Doeg's neck, to the lower side of Pamunkey, in Maryland,	17	17
From Hunting creek warehouse landing, to Frayser's Point or Addison's in ditto,	17	17
From Hugh West's, to Frayser's or Addison's in ditto,	17	17
From Floyd's to Powell's,	8	8
Over Occoquan, in Prince William, to Colchester,	4	4
Over Nominy in Westmoreland,	6	6
From Earl Tankerville's in Loudoun, to Maryland,	6	6
From Noland's in Loudoun, to Arthur Nelson's land in ditto,	5	5
From Swearingen's, Berkeley, to his land in ditto,	5	5
From Harper's to his land in ditto,	5	5
From Foreman's, Frederick, to the opposite shore,	5	5
From Aubrey's in Loudoun, to Hook's in Maryland,	5	5
From Watkins's, opposite Conagochego creek, to Wade's in ditto,	8	8
From Rout's land, Shenandoah, to the fork, or over the main river,	4	4

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	For a Man. cents.	For a Horse. cents.
From Kersey's or Burwell's, to the land of Landon Carter,	5	5
From Key's landing, to William Fairfax's, or his heir's land,	5	5
At Williams's Gap, from Lord Fairfax's land, to Ralph Wormeley's land,	5	5
From Samuel Earl's, Frederick, to Lord Fairfax's,	4	4
From Thomas Bryan Martin's, Frederick, over the Shenandoah,	5	5
From John Turberville's, at Dial's landing, over Potowmac,	8	8
From Ralph Humphreys's, Hampshire, over the South branch of Potowmac,	6	6
From Thompson Mason's, deceased, Loudoun, over Potowmac,	8	8
From R. Parker's, Hampshire, over South branch, Potowmac,	5	5
From Isaac Parsons's, over the South branch of Potowmac, opposite,	6	6
From John Pankake's, Hampshire, over the South branch ditto, to Jacob Earsom's,	5	5
From B. Rankin's, over the Shenandoah, to the land of G. W. Fairfax,	5	5
From Peter Harbout's, Loudoun, over Goose creek, to the land of Dr. W. Selden,	4	4
From Edward Snicker's, at Williams's Gap, over the Shenandoah, opposite,	5	5
From Cuthbert Bullitt's, over the mouth of Quantico,	8	8
From J. Chenowith's, Hampshire, across Cacapon, opposite, to James Largent's,	6	6
From Elias Poston's, ditto, across to his land, opposite,	6	6
From C. Buck's, Frederick, across the north fork of Shenandoah, mouth of Passage creek, to the land of Isaac Hite, opposite,	5	5
From Thomas Buck's, to the land of G. Harden and Rowley Smith,	4	4
From Luther Martin's, Hampshire, across Potowmac, at the confluence of the North and South branches, opposite,	6	6
From Joseph Berry's, across the Shenandoah, opposite,	5	5
From J. Chenowith's, Hampshire, across Great Cacapon creek, opposite,	6	6
From Conrad Glaze's, Hampshire, across South branch Potowmac, to his land, opposite,	6	6
From Rees Prichard's, Hampshire, over the North fork of Great Cacapon,	6	6
From Benjamin Edwards's, Goose creek, Loudoun, over Potowmac, opposite,	6	6

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	For a Man. CENTS.	For a Horse. CENTS.	A. D. 1819. A. R. C. 43.
From John Hooe's, Prince William, across Occoquan, to the Old Warehouse,	4	4	
From Edward McShan's, in Berkeley, across Potowmac river, to the Iron Works in Maryland,	5	5	
From Thomas Bennett's, in Hampshire, to David Meskimmin's, in Maryland,	6	6	
From Baldwin Dade's, in Fairfax, to the opposite shore,	12½	12½	
From the said Baldwin Dade's, to the city of Washington,	37½	37½	
From John Coffman's, in Shenandoah, across the South fork of Shenandoah river, to Abraham Stickler's,	6	6	
From David Mraney's, held under a lease from Denny Fairfax, across Shenandoah river, to Robert Carter's,	5	5	
From Benjamin Kendrick's, across the South branch of Shenandoah river, to Christopher Stover's on the opposite shore,	5	5	
From George Mason's, deceased, in Fairfax, across Potowmac river, to the land claimed by Richard Lee,	25	25	
From John Gatewood's in Shenandoah, across the North fork of Shenandoah river, to Christian Stover's, on the opposite shore,	6¼	6¼	
From John Copsey's, in Hampshire, across Little Cacapon creek, to the opposite shore,	6¼	6¼	
From Thomas Shearer's, opposite to the mouth of Falling Waters, in Berkeley, across Potowmac,	5	5	
From William Carlyle's, in Hampshire, across Great Cacapon, to the opposite shore,	6¼	6¼	
9. On Rappahannock and its Branches.			On Rappahannock and its branches.
From Urbanna to Locust Point,	4	4	
From the lands of J. Chowning, Lancaster, to Urbanna,	50	50	
From Byrd's to Williams's,	33	33	
Over Piscataway creek, in Essex,	4	4	
Over Rappahannock creek, Richmond county,	4	4	
From Lee's land to Robinson's,	8	8	
From Leeds town to the causey opposite,	8	8	
From the public landing at Port Royal, to Gibson's warehouse in King George,	6	6	
From Taliaferro's landing to Carter's,	4	4	
From Alexander's, to Conway's,	4	4	
From the wharf at Newport to Ball's landing,	4	4	

	For a Man. cents.	*For a Horse.* cents.	A. D. 1819. A. E. C. 43.
the Long Reach in the Ohio river, in the county of Ohio, across the said river, to the opposite shore,	8	8	
From Samuel Gamble's and Henry Daniel's, at the mouth of King's creek, in Brooke, across the Ohio river, to their lands on the opposite shore,	8	8	
From their said lands at the mouth of King's creek, across the same, to their lands on the opposite shore,	4	4	
From John Huddleston's, in Kanawha, across Kanawha river, to Henry Banks's, on the opposite shore,	6¼	6¼	
From George Jones's, in Grayson, across New river, to James Jones's,	6¼	6¼	

Rates of ferriage opposite, same.

16. The rates of ferries kept opposite to those abovementioned, shall be governed by the same rates and rules.(*a*)

Rates of ferriage for other things.

17. The transportation of the following things shall be at the rates following: For every coach, waggon, chariot, and the driver, the same as for six horses: for every four-wheeled chaise, phæton and driver, the same as for four horses: for every two-wheeled riding carriage, the same as for two horses: for every hogshead of tobacco, the same as for one horse: for every head of neat cattle, the same as for one horse: for every sheep, hog, goat or lamb, one fifth part of the ferriage for one horse.(*b*)

Penalty for taking more than legal rates.

18. If the keeper of any ferry shall demand and take from any person, a greater sum for the ferriage or toll, than is allowed by this act, such offender shall forfeit to the person so overcharged, the ferriage or toll demanded and received, and two dollars for every such offence; recoverable before any justice of the peace of the county.(*c*)

County court to direct what boats and hands shall be kept; and to require bond and security.

19. The court of every county or corporation, wherein a ferry is, or shall be appointed, shall have, and is hereby declared to have authority of ordering and directing what boat or boats, and the number of hands which shall be kept at each ferry respectively; and the owner of the land whereon any such ferry is, if he hath not already given bond and security, shall, within six months from the commencement of this act, give bond with one security, in the court of the county or corporation wherein such ferry is, in the penalty of sixty dollars, with condition, that he will duly keep such ferry, or cause the same to be kept according to law, and will give immediate passage to all public messengers and expresses, when required, from time to time. And, in case any such person shall neglect or refuse to give such bond, or to cause the same to be given on his behalf, he shall forfeit and pay seven dollars for every month's refusal or neglect, to the Commonwealth, for the use of the literary fund, recoverable with costs before a justice of the peace.(*d*)

Penalty for failing to give bond, &c.

(*a*) 1792, edi. 1794, 1803, and '14, c. 116, § 6.
(*b*) *Ibid*, § 8.
(*c*) 1792, edi. 1794, 1803, and '14, c. 116, § 4.
(*d*) *Ibid*, § 5.

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A. R. C. 43.

Public expresses, who shall, to pass free of ferriage.

20. ALL expresses sent on public service, by a member of the Council, or commander in chief, general or field officer, to the Governor for the time being, or the commanding officer of the militia in the next county, to give intelligence of the approach of an enemy, shall be accounted public messengers, and expresses, and ferry-free, within the condition and meaning of the bond aforesaid, in case the dispatch carried by such express be endorsed *on public service*, and signed on the superscription by the person sending the same.(*e*)

Immunities to ferry-keepers and ferry-men; and penalty for invading the right of ferry.

21. AND, for encouragement of ferry-keepers, and in consideration of setting over public messengers, and the persons exempted by this act: *Be it further enacted*, That all the men attending the said ferries be free of county levies, and from all other public services of constables, clearing highways, impressments, and other things of like nature, and that keepers of ferries shall not be chargeable with any fee for giving bond; and, if the county or corporation court shall find it requisite or useful, that an ordinary be kept, at any ferry, they may license such ferry-keeper, to keep ordinary, without any fee for the license, or obtaining the same, notwithstanding there be sufficient number of other ordinaries in the same county or corporation: *Provided, always*, That every ferry-keeper so licensed to keep ordinary, shall give bond and security, and be liable to the same penalties as other ordinary-keepers. And, if any other person whatsoever shall, for reward, set any person or persons over any river or creek, whereon public ferries are by this act appointed, he or she so offending, shall forfeit and pay twenty dollars for every such offence, one moiety to the ferry-keeper nearest the place where such offence shall be committed, the other moiety to the informer; and, if such ferry-keeper informs, he shall have the whole penalty, to be recovered with costs.(*f*)

Norfolk county court, to let ferries on Elizabeth and its branches.

22. IT shall be lawful for the court of the county of *Norfolk*, to let annually to the highest bidder the ferries across *Elizabeth* river and the branches thereof, taking bond and good security for due payment of the money, and to apply the same as it may be received towards lessening the county levy.(*g*)

Ferries discontinued for non-user.

23. ALL ferries heretofore established, and which have not been generally frequented for the space of two years, shall be, and the same are hereby, discontinued, unless the persons entitled to keep the same, shall, within six months after the passing of this act, procure all necessary boats and ferry-men, for the transportation of passengers at their respective ferries.(*h*)

Ferries to be discontinued for non-user.

24. ALL ferries now established, and which may be hereafter generally disused and unfrequented for the space of two years, shall be likewise discontinued, unless necessary boats and ferry-men are prepared for the same, within the space of six months, after the expiration of the said two years. And all ferries which may be hereafter established, and which shall not be furnished with necessary boats and ferry-men, within the space of six months after the establishment thereof, or

(*e*) 1792, edi. 1794, 1803, and '14, c. 116, § 6.
(*f*) *Ibid*, § 7.
(*g*) 1792, edi. 1794, 1803, and '14, c. 116, § 8.
(*h*) *Ibid* § 10.

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shall at any time thereafter be generally disused and unfrequented for the space of two years, shall be, and the same are hereby discontinued.(*i*)

Proceeding of county court in such case.

25. And it shall be lawful for the court of the county, in which such ferry or ferries shall be, on complaint to them made, to summon the proprietor or proprietors of the same, to shew cause why it shall not be discontinued, and to decide according to the testimony adduced.(*k*)

Ferry keepers may take in passengers either side.

26. It shall and may be lawful for any keeper of a ferry, to take into his boat or boats, any passenger or passengers, carriages, horses, or cattle of any kind whatsoever, on either side, to convey them over and to receive the ferriage for the same; any law, usage, or custom, to the contrary, notwithstanding.(*l*)

Ferries not herein enumerated nor discontinued, to remain.

27. 'It shall and may be lawful, for all proprietors or keepers of ferries established by law, and which may not have been discontinued by the operation of law, omitted to be enumerated in this act, to receive such rates and tolls, as by law they were authorised to demand and receive.'

Repealing clause.

28. All and every other act and acts, clause and clauses of acts, heretofore made, for or concerning any matter or thing within the purview of this act, shall be and are hereby repealed.

Commencement.

29. This act shall commence and be in force, from and after the first day of January eighteen hundred and twenty.

C. 238.

An act, to reduce into one, the several acts giving power to the county courts to establish Ferries, and to regulate the rates of ferriage.

A. D. 1819. A. R. C. 43.

[Passed February 10, 1819.]

Who may apply for establishment of a ferry.

1. *Be it enacted by the General Assembly*, That, when any person or persons shall own the land on both sides of any water-course, through which a public road is, or shall be established, and shall desire to keep a ferry across such water-course, he, she or they, shall make application to the court of the county wherein the said land lieth, who shall order the sheriff to impannel a jury of twelve disinterested freeholders, who shall view the place proposed for keeping such ferry, being first sworn, and, on their oaths, say whether, in their opinion, public convenience will result from the establishment of such ferry. The jury shall certify their opinion under their hands, and deliver it to the sheriff, who shall return it to the court; who, thereupon, as well as upon any other evidence that may be offered, shall have full power to establish such ferry, and fix the rates for passing the same; observing, that the rate for a man, be the same as for a horse; for each head of neat cattle, the same as for a horse; and for each hog, sheep or goat, one

Court's power.

Rule concerning rates of ferriage.

(*i*) 1792, edi. 1794, 1803, and '14, c. 116, § 11.

(*k*) *Ibid*, § 12.

(*l*) 1792, edi. 1794, 1803, and '14, c. 116, § 13.

BEST AVAILABLE CO

Amended Acts 1874/5 p. 86. ch 166

Loudoun—On the fourth Monday in April, third Monday in October, and third Monday in January.

Fauquier—On Tuesday after the first Monday in September, second Monday in December, Tuesday after first Monday in April.

Rappahannock—On Tuesday after third Monday in March, Tuesday after first Monday in June, and fourth Monday in November.

Alexandria county—On the third Monday in May, second Monday in November, and second Monday in February.

City of Alexandria—On the fourth Monday in May, second Monday in September, and third Monday in February.

In the twelfth judicial circuit.

Twelfth judicial circuit

12. Shenandoah—On August twentieth, December fifth, April fifth.

Page—On September first, January fifth, May fifth.

Rockingham—On September tenth, January fifteenth, April fifteenth.

Warren—On October fifth, February twelfth, May fifteenth.

Clarke—On October fifteenth, February twenty-second, May twenty-fifth.

Frederick—On October twenty-seventh, March fourth, June seventh.

In the thirteenth judicial circuit.

Thirteenth judicial circuit

Amended As above

13. Rockbridge—On twenty-fifth February, tenth May, and tenth September.

Augusta—On fifteenth March, first June, and first October.

Highland—On the thirteenth April, third August, and third November.

Bath—On twentieth April, tenth August, and tenth November.

Alleghany—On twenty-fifth April, fifteenth August, and fifteenth November.

In the fourteenth judicial circuit.

Fourteenth judicial circuit

Amended Acts 1874/5 p. 172. ch 173 amended Acts 1874/5 p. 331 Ch. 288

14. Craig—Twenty-first February, twenty-first June, twenty-fourth October.

Roanoke—First April, first July, fourth November.

Botetourt—Fifteenth April, fifteenth July, fifteenth November.

Floyd—Third May, third August, third December.

Montgomery—Tenth May, tenth September, tenth December.

Giles—Twenty-sixth May, twenty-sixth September, twenty-sixth December.

In the fifteenth judicial circuit.

Fifteenth judicial circuit

15. Wythe—First Monday in March, second Monday in September, and first Monday in December.

Pulaski—Third Monday in March, third Monday in August, and fourth Monday in October.
Carroll—Third Monday in April, second Monday in August and October.
Tazewell—First Monday in May and September, and second Monday after the fourth Monday in October.
Bland—Third Monday in May, fourth Monday in August, and fourth Monday after the fourth Monday in October.
Grayson—First Monday in April and August, and last Monday in September.

amended Act. 1874/5 p. 86. ch 10.

In the sixteenth judicial circuit.

Sixteenth judicial circuit

16. Buchanan—Last Monday in July, Tuesday after last Monday in October, and last Monday in February.
Russell—First Monday in August, November, and March.
Scott—Thursday after second Monday in August, November, and March.
Lee—Fourth Monday in August, November, and March.
Wise—Friday after first Monday after fourth Monday in August, November, and March.
Smyth—Third Monday in September, December, and April.
Washington—First Monday in October, January, and May.

amended Acts 1874/5 p. 13. ch. 15.

Repeal of law authorizing the judges to fix the terms of their courts

17. The fifteenth section of the one hundred and fifty-fifth chapter of the Code of eighteen hundred and seventy-three, authorizing the judges of the circuit courts to fix the time for holding the terms of said courts, shall be repealed on and after the day on which this act takes effect in each county of the state.

See Code 1873, c. 155, § 15, p. 1044

When act takes effect

18. This act shall take effect in each county in the state on the day after the last day of the first term of the circuit court for such county held in the year eighteen hundred and seventy-four, in pursuance of section fifteen of chapter one hundred and fifty-five of the Code of eighteen hundred and seventy-three: provided, that if in any county the first term fixed under this act would fall during the continuance of, or subsequent to the first term of the circuit court of such county held in the year eighteen hundred and seventy-four, in pursuance of the said section, then this act shall take effect as to such county on the day preceding the day fixed for the second term for such county under this act.

see Act p. 175. ch 157

CHAP. 135.—An ACT to Designate the Arbitrators to Ascertain and fix the Boundary between the States of Maryland and Virginia.

Approved March 28, 1874.

Preamble

Whereas, a controversy exists as to the true line of boundary between the states of Maryland and Virginia; and whereas, the state of Maryland, by resolutions of its general assembly now in session, has declared its willingness to sub-

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mit the said controversy to arbitration, and to accept as final and conclusive such award as may be made in the premises: therefore,

Who to arbitrate and decide the boundary between Virginia and Maryland

1. Be it enacted by the general assembly of Virginia, That the settlement and determination of the true line of boundary between the states of Maryland and Virginia be referred to the Honorable Jeremiah S. Black of Pennsylvania, and the Honorable William A. Graham of North Carolina, and a third person to be selected by them; who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between the said states of Virginia and Maryland, and to make and deliver their award in writing, any two of them concurring therein. Each state shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe. And the state of Virginia hereby pledges its faith to accept and abide by the award of said arbitrators in the premises, as final and conclusive: provided, further, that neither of the said states nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever.

Counsel may be chosen

Pledge to abide by award

Temporary line designated until award is final

2. And be it further enacted, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake bay known as the Lovett-Davidson line shall be faithfully observed by the citizens of the said two states.

Governor to communicate act to governor of Maryland

3. The governor is hereby requested to forward a copy of this act to the governor of Maryland, with a request that he present the same to the general assembly of that state for their concurrent action in the premises.

Commencement

4. This act shall be in force from its passage.

CHAP. 124.—An ACT to Incorporate the St. George's Benevolent Society of Fredericksburg, Virginia.

Approved April 3, 1874.

St. George's Benevolent Society of Fredericksburg incorporated

1. Be it enacted by the general assembly, That Reverend Edmund C. Murdaugh, John Coakley, John James Young, William H. Fitzhugh, Fayette W. Johnston, William S. Barton, James Taylor, Elliott M. Braxton, James F. Thompson, David S. Forbes, Randolph C. Fitzhugh, Charles E. Tackett, A. W. Wallace, Basil Gordon, Jr., R. C. L. Monoure, J. G. Mason, John T. Goolrick, Joseph B. Ficklen, George B. Scott, M. Slaughter, A. K. Phillips, and such other persons as are now or may hereafter be associated with them, be, and they are hereby incorporated and made a body politic, under the title of the Saint George's Benevolent Society of Fredericks-

burg, Virginia, and as such shall have power to sue and be sued, contract and be contracted with, and to hold, buy, sell, or lease real and personal property in or near said town of Fredericksburg: provided, that it shall not hold or possess, at any one time, property to an amount exceeding one hundred thousand dollars. Corporate powers. Property limited.

2. That for the purpose of benefitting the poor of said town of Fredericksburg, and assisting needy widows and orphans, the said society may receive and hold such donations or bequests as may be made to it by charitably disposed persons; and with the proceeds of such donations or bequests, or with means furnished by its own members, may make such provision for the poor of said town of Fredericksburg as said society may deem proper for their relief. Power to receive and hold donations or bequests. Provision for poor of Fredericksburg.

3. That for more effectually carrying out the purposes and objects of said society, (that is, benefitting the poor of said town,) it is authorized and empowered, if it think proper to do so, out of the contributions made by its members and such donations or bequests as may be from time to time made to it by charitably disposed persons, to establish asylums for aged persons or for poor widows or orphans, reformatories or schools, and support and manage the same. May establish asylums, reformatories or schools, for aged persons, widows or orphans.

4. That said society may make such rules and regulations for its own government, or for that of the asylums, reformatories or schools under its charge, as it may from time to time think proper: provided, the same be not in conflict with the Constitution and laws of the United States or the constitution and laws of this commonwealth. Rules and regulations for institutions.

5. The said society shall hold all donations or bequests made to it, upon the trusts, conditions, and stipulations specified in the instrument making or creating such donation or devise: provided, the same be within the general scope and object of said society. How society to hold donations or bequests.

6. This act shall be subject to modification or amendment, at the pleasure of the general assembly, and to all general laws now in force, or which may hereafter be passed, in relation to incorporated companies of like character. Charter under control of legislature.

7. This act shall be in force from its passage. Commencement.

CHAP. 187.—An ACT to amend and re-enact Section 41 of Chapter 86, Code of 1878, in Relation to Inspections.

Approved April 3, 1874.

1. Be it enacted by the general assembly, That section forty-one, chapter eighty-six, Code of eighteen hundred and seventy-three, be amended and re-enacted so as to read as follows: Chapter 86, § 41, of Code of 1873, relative to exportation or sale, without inspection, amended. Code 1873, p. 736

"§ 41. If any person shall export, or put on board of any vessel for exportation, in any of the cities or towns on tide-water in this state, or sell or offer to sell any fish in the cities Exportation or sale of fish without inspection prohibited.

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CHAPTER 246.

AN ACT to provide for indexing the land and chattel records of Baltimore county.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the Clerk of the Circuit Court for Baltimore county, be and he is hereby authorized to cause a general index to the land and chattel records in his office, to be made under the system known as the "Campbell System," now in use in Frederick county, and shall be entitled to receive therefor, the sum of five cents for each name in which said indexes are made, to be paid for by the County Commissioners of Baltimore county, in monthly payments as the work progresses, on the certificate of the Circuit Court for said county, that said work has been properly performed. General index to be made.

SEC. 2. *And be it enacted*, That the County Commissioners of Baltimore county are hereby authorized and directed to levy on the assessable property of said county, such sums as may be necessary, and pay for the work as above described. Pay for the work.

SEC. 3. *And be it enacted*, That the Clerk of the Circuit Court, the Register of Wills and the Sheriff, shall pay to the said County Commissioners of Baltimore county, any excess of fees which may accrue in their respective offices, until the cost to the county shall be reimbursed. Shall pay over excess.

SEC. 4. *And be it enacted*, That this act shall take effect from the date of its passage. To take effect.

Approved, April 11th, 1874.

CHAPTER 247.

AN ACT to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland.

WHEREAS, a controversy exists as to the true line of the boundary between the States of Virginia and Maryland; and, Preamble.

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Preamble.

WHEREAS, the State of Virginia, by an act of its General Assembly, entitled an act to designate the arbitrators to ascertain and fix the boundary between the States of Maryland and Virginia, approved on the twenty-eighth day of March, in the year of our Lord, one thousand eight hundred and seventy-four, has declared its willingness to submit the said controversy to arbitration, and to accept as final and conclusive, such award as may be made in the premises; therefore—

Boundary line.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, who are hereby requested to act as arbitrators, and to ascertain and determine the true line of boundary between the said States of Virginia and Maryland, and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before said arbitrators, subject to such regulations as they may prescribe; and the State of Maryland hereby pledges its faith to accept and abide by the award of said arbitrators in the premises as final and conclusive; provided, however, that neither of the States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said States and the citizens thereof, forever.

Arbitrators.

Accept and abide by

Final adjustment.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake Bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States; and the Governor is hereby requested to forward a copy of this act to the Governor of Virginia.

To force

SEC. 3. *And be it enacted*, That this act shall be in force from its passage.

Approved, April 11th, 1874.

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CHAPTER 198.

AN ACT supplementary to an act to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland, approved April the eleventh, eighteen hundred and seventy four.

WHEREAS, by an act of the General Assembly of Maryland, passed at the January session, eighteen hundred and seventy-four, chapter two hundred and forty-seven, entitled "an act to designate the arbitrators to ascertain and fix the boundary between the States of Virginia and Maryland;" it was provided, that the settlement and determination of the true line of boundary between the States of Virginia and Maryland, be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person to be selected by them, and they did select accordingly as a third person, the Honorable Charles A. Jenkins, of Georgia, but the said William A. Graham has since departed this life; now for filling the vacancy thereby created, and for carrying out the purposes of the said act; therefore, Preamble.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, with the concurrence of the State of Virginia, That the said Honorable Jeremiah S. Black, and the Honorable James B. Beck, of Kentucky, and the said Honorable Charles A. Jenkins, do proceed to ascertain and determine the true line of boundary between the States of Virginia and Maryland, and do make and deliver their award in writing, any two of them concurring therein. Each State shall have the right to be represented by counsel before the arbitrators under such regulations as they may prescribe, and the State of Maryland hereby pledges its faith to accept and abide by the award of the said arbitrators in the premises, as final and conclusive; provided, however, that neither of the said States, nor the citizens thereof, shall by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set Commission to determine boundary line

Right to be represented.

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forth in the compact between them, entered into in the year seventeen hundred and eighty-five; but that the same shall remain to, and be enjoyed by the said States, and the citizens thereof forever; and provided further, that the landholders on either side of the line of boundary between the said States as the same may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands, as they may be at the date of said award, but shall in any case, hold and possess the same as if their said titles and possession had been derived under the laws of the State, in which, by the fixing of the said line by the terms of the said award, they may be ascertained to be.

Title to and possession.

Line to be observed.

SEC. 2. *And be it enacted*, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two States.

Vacancy.

SEC. 3. *And be it enacted*, That if, in the recess of the Legislature a vacancy shall occur by reason of the death, resignation or refusal to act, of any of the persons herein appointed to settle and determine the said line of boundary as aforesaid, a fit person or persons shall be appointed by the concurrent action of the Governor of Maryland, and the Governor of Virginia, or of the Legislature of the latter State, as the case may be, who with those already appointed, and who may act in the premises, shall exercise the powers and perform the duties defined and imposed in the first section of this act.

Forward a copy.

SEC. 4. *And be it enacted*, That the Governor is hereby requested to forward a copy of this act to the Governor of Virginia, with a request that he present the same to the General Assembly of that State, and that he communicate to the Honorable James B. Beck, his appointment under this act, and request his acceptance of the same.

In force.

SEC. 5. *And be it enacted*, That this act shall take effect from the date of its passage.

Approved April 3, 1876.

Testimony upon which certificate is granted to accompany certificate to auditor

3. Hereafter the testimony upon which the certificate of the county or corporation judge is issued, shall accompany the certificate required by law; both of which shall be transmitted by the clerk of the county or corporation court to the auditor of public accounts. And it shall be the duty of the auditor to examine such testimony, and unless in his judgment the testimony accompanying the certificate of the judge shall make out a case of disability as required by law, he shall not issue his warrant for the commutation provided by this act.

Authority of auditor of public accounts to issue warrants

4. The auditor of public accounts is hereby authorized to issue his warrants on the treasury to pay the claims properly allowed under this act, and the same shall be paid out of any money therein not otherwise appropriated.

$2,000 of the appropriation to be reserved for certain purposes

5. It is provided that two thousand dollars of the sum hereby appropriated, shall not be paid out of the treasury within the period of sixty days after the passage of this act to any person who may claim its benefits, other than one of those who has heretofore filed his claim for a similar benefit, and who shall have within that period, established his right to share in the appropriation hereby made in accordance with the terms of this act.

Commencement

6. This act shall be in force from its passage.

CHAP. 47.—An ACT in relation to Cemeteries and Cemetery Associations.

Approved February 10, 1876.

Towns, counties, magisterial districts, cemetery associations, ecclesiastical or other societies may hold real estate for burial grounds

1. Be it enacted by the general assembly of Virginia, That it shall be lawful for incorporations of towns, counties, magisterial districts, cemetery associations, and ecclesiastical, or other societies, to own real estate for burial grounds, and may appoint superintendents and sextons for their cemeteries, who shall have the exclusive right to direct as to the opening of graves; and no grave shall be opened in such cemetery except with the consent of said superintendents or sextons, or the owners, under a penalty of ten dollars, to be recovered by the owners of the cemetery.

Owners may enact by-laws

2. Such owners may enact by-laws providing for the care and management of all burial lots, and the protection of all shrubs, trees, fences, and ornaments thereon, and may provide a hearse for the burial of the dead, and procure and hold lands for burial grounds.

3. The owner of any cemetery, who wishes to enlarge its limits by adding land, the title of which he cannot otherwise acquire, may present a petition to the county court, or the judge thereof in vacation, of the county in which the existing cemetery is situated, and said court or judge may appoint twelve disinterested freeholders, who, after examining the premises and notifying the land-owner that he may be heard

by them, and after hearing the parties, shall report to said court as to the necessity and propriety of such enlargement, and as to the quantity, boundaries, and value of the land which they may deem proper to be taken for that purpose, and the damages resulting from the same. And if said commission shall report that said enlargement is necessary and proper, and the court shall approve the said report, the decision of such court shall have the effect of a judgment, and execution may be issued thereon accordingly, in favor of the person to whom damages may be assessed, for the amount thereof and costs; and on payment thereof, the title to the land for such purpose only shall be vested in the petitioner; but such land shall not be taken until such damages and costs shall be paid to such owner, or deposited with the treasurer of the county for the use of the land owner, which shall be thus paid within thirty days after the said report shall be approved and confirmed. If said application shall be ordered, the owner of the land shall recover costs of the applicant, to be taxed by the court, which may issue execution therefor.

4. The county court of any county, on the petition of any ten citizens, may cause to be condemned for any burying ground, any amount of land not exceeding two acres, in any magisterial district, and in the mode prescribed by section three of this chapter. Powerful mode for the county court to condemn land for burying ground

5. No land shall be condemned under the provisions of this act within the corporate limits of any city or town, or within four hundred yards of any residence outside of the corporate limits of any city or town, without the consent of the owner of such residence.

6. The provisions of this act shall be subject to amendment or repeal by the general assembly.

7. This act shall be in force from its passage. Commencement

CHAP. 48.—AN ACT to amend and re-enact an act to designate the Arbitrators to Ascertain and Fix the Boundary of the States of Maryland and Virginia, approved March twenty-eighth, eighteen hundred and seventy-four.

Approved February 16, 1876.

Whereas by an act of the general assembly, approved March twenty-eighth, eighteen hundred and seventy-four, entitled an act to designate the arbitrators to ascertain and fix the boundary between the states of Maryland and Virginia, it was provided that the settlement and determination of the true line of boundary between the states of Maryland and Virginia be referred to the Honorable Jeremiah S. Black, of Pennsylvania, and the Honorable William A. Graham, of North Carolina, and a third person, to be selected by them, and they did select accordingly, as a third person, the Honorable Charles A. Jenkins, of Georgia, but the said William A. Graham has since depart this life; now, for filling the va- Preamble

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cancy thereby created, and for carrying out the purposes of the said act, therefore,

Names of arbitrators

1. Be it enacted, with the concurrence of the state of Maryland, That the said Honorable Jeremiah S. Black and Honorable J. B. Beck of Kentucky, with the said Honorable Charles A. Jenkins, as arbitrators, do proceed to ascertain and determine the true line of boundary between the said states of Maryland and Virginia, and do make and deliver their award in writing, any two of them concurring therein. Each state shall have the right to be represented by counsel before the arbitrators, under such regulations as they may prescribe. And the state of Virginia hereby pledges its faith to accept and abide by the award of the said arbitrators in the premises, as final and conclusive: provided however, that neither of the said states, nor the citizens thereof, shall by the decision of the said arbitrators be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year seventeen hundred and eighty-five, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever: and provided further, that the landholders on either side of the line of boundary between the said states, as the same may be ascertained and determined by the said award, shall in no manner be disturbed thereby in their title to and possession of their lands, as they may be at the date of said award, but shall in any case hold and possess the same, as to their said titles and possession had been derived under the laws of the state in which; by the fixing of the said line by the terms of the said award, they may be ascertained to be.

Award of arbitrators

2. And be it further enacted, That until the final adjustment and settlement of the said line of boundary, the temporary line across the Chesapeake bay, known as the Lovett-Davidson line, shall be faithfully observed by the citizens of the said two states.

How vacancy is filled

3. Be it further enacted, That if, in the recess of the legislature, a vacancy shall occur by reason of the death, resignation, or refusal to act of any of the persons herein appointed to settle and determine the said line of boundary as aforesaid, a fit person or persons shall be appointed by the concurrent action of the governor of Virginia and of the governor of Maryland, or of the legislature of the latter state, as the case may be, who with those already appointed and who may act in the premises, shall exercise the powers and perform the duties defined and imposed in the first section of this act.

Governor requested to forward a copy of this act to the governor of Maryland

4. The governor is hereby request to forward a copy of this act to the governor of Maryland, with a request that he present the same to the general assembly of that state for their concurrence in the premises, and that he communicate to the Honorable James B. Beck his appointment under this act and request his acceptance of the same.

Commencement

5. This act shall be in force from its passage.

CHAP. 49.—AN ACT for the Relief of Township Creditors.

Approved February 16, 1876.

Preamble. Whereas it is represent to the general assembly, That some of the late township boards in this state failed to provide for the payment of the debts of their respective townships, before the first of July, eighteen hundred and seventy-five, when the powers of said boards ceased, and there being now no legal mode of providing for the same; therefore,

Authority of board of supervisors to provide for the payment of any outstanding debts. 1. Be it enacted by the general assembly of Virginia, That it shall be lawful for the board of supervisors of any county in this commonwealth to provide for the payment of any outstanding debts against any of the late townships in such county, created prior to November fourth, eighteen hundred and seventy-four, by levying on the persons and property of the magisterial districts into which such townships have been changed, a sufficient amount for that purpose, and for defraying all costs and expenses of collecting and paying out the same; which levy shall be made in accordance with the late law in regard to township levies, as far as the same is consistent with this act.

County treasurer to collect such levy. 2. It shall be the duty of the county treasurer to collect such levy and pay out the same upon the outstanding warrants of the late township boards, or where such warrants have not been issued to the township creditors, then upon the warrants of the board of supervisors drawn for that purpose, when approved as hereinafter provided. But all warrants drawn by the board of supervisors of any county, for the payment of township debts, shall designate upon their faces the names of the respective townships, whose debts they are intended to pay.

Treasurer to keep a separate account. 3. The treasurer shall keep a separate account of the levies collected and paid out under this act, and shall report the same to the board of supervisors, with the vouchers for such payments, at the time of his annual settlement; and also a list of delinquents, which shall be examined by the board and allowed as far as the same may appear correct. He shall be entitled to the same commission for his services under this act as for the collection and payment of the county levies, and shall have all the remedies for the collection of the levies herein provided for, as are given him by law for the collection of county levies. But all claims allowed by the board of supervisors under this act, shall be subject to approval by the county court and shall not be paid until such approval is endorsed on the warrant for said claims and signed by the judge of said court.

Commissions for his services. Remedies.

How board of supervisors compelled to act.

4. If any board of supervisors fail to do any of the things required by this act, upon application of any person interested, the county court may, by mandamus, compel such board to do such act.

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be and the same is hereby repealed and re-enacted so as to read as follows:

Fees of notaries public.

SEC. 21. Notaries Public shall be entitled to demand and receive the following fees, to wit: For protesting any note, draft, bill of exchange or check, for non-acceptance or non-payment, two dollars; for drawing all proceedings not exceeding two sides, fifty cents; for drawing all proceedings exceeding two sides, per side, twenty-five cents; for registering or copying proceedings, for every side, ten cents; for presenting a bill of exchange for acceptance, if accepted and not afterwards protested for non-payment, one dollar; for noting a bill for non-acceptance, if not protested for non-acceptance or non-payment, one dollar; for noting a marine protest, one dollar; for affixing notaries' seal, fifty cents; for every search where no copy is made, twenty-five cents; for administering an oath or taking an acknowledgment, twelve-and-a-half cents; for all other acts and service, in proportion to the aforesaid fees, to be paid at the time of doing the same. For going any distance more than three miles from his residence, per mile, twenty cents; for every notice of protest mailed or delivered, five cents; for presentation and demand for payment of a promissory note, a bill of exchange, if payment of same be made to the notary, one dollar.

In force.

SEC. 2. *And be it enacted*, That this act shall take effect from the date of its passage.

Approved April 5, 1878.

CHAPTER 274.

AN ACT to approve, confirm and ratify the award made by the Honorable Jeremiah S. Black, James B. Beck and Charles A. Jenkins, arbitrators appointed to ascertain and fix the boundary between the States of Virginia and Maryland.

Preamble.

Whereas by an act of the General Assembly of Maryland, passed at January session, eighteen hun-

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dred and seventy-six, chapter one hundred and ninety-eight, it was provided that the settlement and determination of the true line of boundary between the States of Virginia and Maryland should be referred to the Honorable Jeremiah S. Black, of Pennsylvania, the Honorable James B. Beck, of Kentucky, and the Honorable Charles A. Jenkins, of Georgia, with power to make and deliver their award in writing, any two of them concurring therein, and did thereby pledge the faith of this State to accept and abide by the award of said arbitrators, as to said boundary line as final and conclusive, with the proviso and saving clauses, as to private rights, as in the said act set forth; and, whereas the said arbitrators did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to wit:

Award.—And now to wit: January sixteenth, Anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the States of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said States and examined the proofs on both sides, do find, declare, award, ascertain and determine that the true line of boundary between the said States, so far as they are conterminous with one another, is as follows, to wit: Award.

Beginning at the point on the Potomac River where the line between Virginia and West Virginia strikes the side river at low water mark, and thence following the meanderings of said river by the low water mark to Smith's Point, at or near the mouth of the Potomac, in the latitude 37° 53′ 08″, and longitude 76° 13′ 46″; thence crossing the waters of the Chesapeake Bay by a line running north 65° 30′ east, about nine and a-half nautical miles, to a point on the western shore of Smith's Island, at the north end of Sassafras Hammock, in latitude 37° 57′ 13″, longitude 76° 02′ 52″; thence across Smith's Island south 88° 30′ east, five thousand six hundred and twenty yards, to the centre of Horse Hammock, on Point of beginning.

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the eastern shore of Smith's Island, in latitude 37° 57' 06', longitude 75° 59' 20'; thence south 79° 30' east, four thousand eight hundred and eighty yards, to a point marked "A" on the accompanying map, in the middle of Tangier Sound, in latitude 37° 56' 42', longitude 75° 56' 28', said point bearing from Jane's Island Light south 54° west, and distant from that light three thousand five hundred and sixty yards; thence south 10° 30' west, four thousand seven hundred and forty yards, by a line dividing the waters of Tangier Sound, to a point where it intersects the straight line from Smith's Point to Watkins' Point, said point of intersection being in latitude 37° 54' 21', longitude 75° 56' 55', bearing from *Jane's Island* Light south 29° west, and from Horse Hammock south 34° 30' east. This point of intersection is marked "B" on the accompanying map. Thence north 85° 15' east, six thousand seven hundred and twenty yards along the line above-mentioned, which runs from Smith's Point to Watkins' Point, until it reaches the latter spot, namely, Watkins' Point, which is in latitude 37° 54' 28', longitude 75° 52' 44'. From Watkins' Point the boundary line runs due east, seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pokomoke Sound, which is marked "C" on the accompanying map, and is in latitude 37° 54' 38', longitude 75° 47' 50'; thence by a line dividing the waters of Pokomoke Sound, north 47° 30' east, five thousand two hundred and twenty yards, to a point in said sound marked "D" on the accompanying map, in latitude 37° 56' 25', longitude 75° 45' 26'; thence following the middle of the Pocomoke River by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May 28th, 1668, at a point in the middle of the Pocomoke River, and in the latitude 37° 59' 37', longitude 75° 37' 04'; thence by the Scarborough and Calvert line, which runs 5° 15' north of east to the Atlantic Ocean.

Latitudes and longitudes.

Latitude, &c. The latitude, longitude courses and distances here given have been measured upon the coast chart, No. 33, of the United States Coast Survey (sheet No. 3 Chesa-

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peake Bay), which is herewith filed as part of this award and explanatory thereof. The orignal charter line is marked upon the said map and shaded in blue. The present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five between Smith's Point and Watkins' Point.

Explanation.

In further explanation of this award the arbitrators deem it proper to add that—

Measurement

1st. The measurement being taken and places fixed according to the coast survey, we have come as near to perfect mathematical accuracy as in the nature of things is possible. But in case of any inaccuracy in the described course or length of line or in the latitude or longitude of a place, the natural objects called for must govern.

Thread of Pocomoke river.

2nd. The middle thread of Pocomoke river is equi-distant as nearly as may be between the two shores without considering arms, inlets, creeks or affluents as part of the river, but measuring the shore lines from headland to headland.

Low water on the Potomac.

3rd. The low water mark on the Potomac river, to which Virginia has a right in the soil, is to be measured by the same rule, that is to say, from the low water mark at one headland to low water mark at another, without following indentations, bays, creeks, inlets or affluent rivers.

Entitled to full dominion

4th. Virginia is entitled not only to full dominion over the soil to low water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low water mark as may be necessary to a full enjoyment of her riparian ownership without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

In testimony whereof we have hereunto set our hands the day and year aforesaid.

J. S. Black, *of Pennsylvania.*

Chas. A. Jenkins, *of Georgia.*

A. W. Graham, *Secretary.*

And which said award is now deposited with the map accompanying the same in the Land Office of this State, among the munimonts of title; now, therefore,

Award ratified.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the said award is hereby approved, accepted, confirmed and ratified, and that as soon as the same is also approved, accepted, confirmed and ratified by the General Assembly of the State of Virginia, and by the Congress of the United States, thereupon and immediately thereafter the said award and survey matter and things therein contained shall be obligatory on the State and the citizens thereof, and shall be forever faithfully and inviolably observed, and kept by this State and all its citizens, according to the true intent and meaning of the same, and to that end the faith of this State shall stand pledged.

Governor to forward copies

SEC. 2. *And be it enacted*, That the Governor is hereby requested to forward a copy of this act to the Governor of Virginia, with a request that the General Assembly of said State shall also enact a law in accordance herewith; and, shall, also, forward a copy to our Senators and Representatives in Congress, with a request that they procure such legislation on the part of the United States as may be needful in the premises for their assent to and ratification of said award.

Approved April 4, 1878.

CHAPTER 275.

AN ACT to incorporate the Trustees of the Asbury Methodist Episcopal Church, Sharptown, Wicomico county.

Corporators.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That Robert Twilley, John Robinson,

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THE ANNOTATED CODE
OF THE PUBLIC GENERAL LAWS
OF MARYLAND
1957

SUPERSEDED
SEE LATER EDITION

Prepared by the Editorial Staff of the Publishers

Under the Supervision of

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Director, Department of Legislative Reference

Consultant

IN TEN VOLUMES

With Provision for Subsequent Pocket Parts

VOLUME 6

The Michie Company, Law Publishers
Charlottesville, Va.
1957

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IN GENERAL.

BOARD OF NATURAL RESOURCES

§ 1. Creation and composition.

There is hereby created a State agency to be known as the Board of Natural Resources to coordinate the activities of the several State departments that are concerned with the conservation of natural resources. The Board shall be composed of the Chairman of the Commission of Tidewater Fisheries, the Director of the Game and Inland Fish Commission, the Director of Department of Forests and Parks, the Director of the Department of Geology, Mines and Water Resources, the Director of Research and Education and eight other members to be appointed by the Governor, two from the tidewater counties of the Eastern Shore, two from the tidewater counties of the Western Shore, and four from the State at large. Two of those appointed from the tidewater counties shall have practical knowledge of tidewater fisheries and shall have no financial interest in the fisheries industry. The Chairman of the Commission of Tidewater Fisheries shall serve as Chairman of the Board and for his services as Chairman he shall receive such compensation as shall be provided in the State budget. (An. Code, 1951, § 1; 1941, ch. 308, § 1; 1947, ch. 498, § 1; 1951, ch. 623.)

§ 2. Terms; vacancies; compensation; meetings.

The term of office of the six appointed members of the Board shall be six years from June 1, 1941, but of those first appointed, one shall serve for one year, one for two years, one for three years, one for four years, one for five years and one for six years. On and after June 1, 1947, there shall be eight appointed members of said Board, and any appointments or reappointments made after said June 1, 1947, shall be for a term of four years. The Governor may remove any appointed

Talbot counties shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or be imprisoned in the house of correction not less than three (3) months nor more than six (6) months, or be both fined and imprisoned at the discretion of the court.

In addition thereto, at the discretion of the court hearing the case, any boat, dredge, or other device, truck, trailer, or any other thing appurtenant thereto, used in connection with the violation, may be declared forfeited to the State of Maryland and delivered to the Commission of Tidewater Fisheries for such disposition thereof as, in the opinion of the said Commission, may be most advantageous to the State. All monies received from such fines, and from the disposition of any forfeited boat, dredge, or other device, truck, trailer, or any other thing appurtenant thereto, when in such disposition a sale thereof by the State of Maryland is involved, shall be paid to the Comptroller of the treasury, or his agents, and credited to the "Clam Fund." (An. Code, 1951, § 665; 1945, ch. 929, § 16; 1947, ch. 604, § 16; 1947, Sp. Sess., ch. 22, § 16 (c-1); 1953, ch. 744; 1956, ch. 13; 1957, chs. 494, 644.)

Effect of amendments. — The 1956 amendment eliminated the former second and third paragraphs of subsection (a) (1), added the present second paragraph therein and corrected the cross reference in that subsection.

The 1953 amendment added the second sentence of subsection (m). Chapter 644, Acts 1957, added "truck, trailer, or other conveyance" near the end of paragraph (2) of subsection (a). Chapter 494, Acts 1957, added subsection (n).

Failure to set aside and turn over to the State oyster shells as required by subsection (a) of § 705 held a misdemeanor. State v. Kennerly, 201 Md. 412, 101 A. (2d) 632, 106 A. (2d) 90.

Former law.—As to validity of former acts providing for forfeiture of boat, see Smith v. Maryland, 59 U. S. (18 How.) 71, 15 L. Ed. 269; The Ann, 8 F. 923; Booth v. Lloyd, 33 F. 593; Ex parte Insley, 33 F. 680.

Cited in Clark v. Todd, 192 Md. 487, 64 A. (2d) 547; Kisner v. State, 209 Md. 324, 122 A. (2d) 102.

WATER RESOURCES

IN GENERAL

§ 718. Policy of State.

In order to conserve, protect and utilize the water resources of the State, in accordance with the best interests of the people of Maryland, it is hereby declared to be the policy of the State to control, so far as practicable, the appropriation or use of surface and underground waters of the State. It is also declared to be the policy of the State for the purpose of promoting the public safety and welfare, to control and supervise so far as is practicable, the construction, reconstruction and repair of dams, reservoirs and all other waterworks in any of the waters of the State. (An. Code, 1951, § 666; 1939, art. 96B, § 1; 1933, ch. 526, § 1.)

Cross reference.—As to attachment of a Water Engineer to the Department of Geology, Mines and Water Resources, whose duties shall be to enforce §§ 718-735 of this article, see § 17 of this article.

§ 719. Program, surveys, maps and studies.

The Department of Geology, Mines and Water Resources shall devise and develop a general water resources conservation program for the State. This program shall contemplate the proper conservation, allocation and development of all of the waters, surface and underground, of the State for the best interests of all of the people of Maryland, and shall guide the Department in the issuance of water, water power, dam, reservoir and other permits, as hereinafter provided. The Department is hereby authorized and empowered to make, or cause to be

made, all such surveys, maps, investigations and studies of the water resources of the State as it may deem necessary to provide it with sufficient information to formulate a program, and to perform its duties under this subheading. All other departments, boards, officials and agencies of the State of Maryland are hereby directed to cooperate with and assist the Department of Geology, Mines and Water Resources in the performance of its duties and the exercise of its powers. (An. Code, 1951, § 447; 1939, art. 96B, § 3; 1933, ch. 520, § 3; 1941, ch. 508, § 12A.)

§ 720. Illegal appropriation of State waters.

From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political subdivision of the State, to appropriate or use any waters of the State, surface or underground, without the consent or permit of the Department of Geology, Mines and Water Resources, in writing, previously obtained, upon written application therefor to the Department. Nothing in this section shall be construed to apply to the use of water for domestic and farming purposes or to the use of water for an approved water supply of any municipality; nor shall it apply to any particular use in existence on January 1, 1934, provided such use is not thereafter abandoned. (An. Code, 1951, § 448; 1939, art. 96B, § 4; 1933, ch. 520, § 4; 1941, ch. 508, § 12A.)

§ 721. Construction or repair of reservoirs, dams or waterway obstructions.

(a) *Permit required.*—From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political subdivision of the State, to construct, reconstruct or repair any reservoir, dam or waterway obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in, addition to, or repair of, any existing waterway obstruction; or in any manner to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly, within this State, except the tidal waters, without a permit from the Department of Geology, Mines and Water Resources, in writing, previously obtained, upon written application therefor to said Department. Nothing in this subsection shall be construed to apply to any dam or obstruction which is ten feet or less in height above the elevation of the stream bed or waterway, nor shall it apply to any reservoir with a storage capacity of less than one million gallons, nor shall it apply to any structure for the impounding of water over nontidal swamp lands for the propagation of muskrats.

(b) *"Farm ponds".*—Nothing in this section shall be construed to extend to or affect in any way "farm ponds" constructed for purposes of soil-conservation, propagation of fish, watering of stock, and fire protection, except as in this subsection provided. Farm ponds in order to be exempt shall be formed by the construction of an all-earth dam or embankment with an all-earth spillway; the possible depth of water at the spillway level of the dam or embankment shall not exceed nine (9) feet; the water surface area of the pond at the spillway level shall not exceed 60,000 square feet; the drainage area contributory to or diverted to the pond shall not exceed one hundred acres; the dam or embankment forming the pond shall not be closer than five hundred feet to a place for human habitation or public road so situated as to be endangered by the breaking or failure of the dam or embankment.

Prior consent in writing for the construction of any such farm pond shall be obtained from all abutting property owners within a distance of five hundred feet

downstream from the dam or embankment. Copies of such consents and of the location and construction plans and specifications of the dam or embankment shall be filed with the Department before the construction thereof is commenced. Any proposed construction or change which would increase the possible depth of water at the spillway level of an existing farm pond, or which would increase the water surface area of any existing farm pond, shall be subject to the procedures and requirements specified in this subsection. Notice of the proposed removal or destruction of any such dam or embankment shall be sent to the Department at least thirty days in advance thereof.

(c) *Other ponds constructed as farm ponds.* In addition to, and not in substitution of, the foregoing provisions of this section, nothing in this section shall be construed to extend to or affect in any way "ponds" constructed as farm ponds except as in this subsection provided.

A pond constructed under the provisions of this subsection shall not have a water surface area in excess of five acres at the spillway level; nor shall it have a maximum depth of water in excess of fifteen (15) feet at the spillway level of the dam or embankment, the measurement to be upward from the original stream bed at the point of the dam or embankment. However, excavation for additional water capacity is permitted to any depth at any location in the pond, other than within twenty-five (25) feet of the intersection of the established bottom and heel of the embankment, provided the slope of the excavation from a line of twenty-five (25) feet upstream from the heel of the embankment, to the maximum depth, shall not exceed one vertical foot for each six horizontal feet.

The contributory drainage area for an impoundment constructed across a waterway shall not be in excess of four hundred (400) acres in any portion of the State northerly and westerly from the main line tracks of the Baltimore and Ohio Railroad Company between the District of Columbia and the State of Delaware (en route to Wilmington, Delaware); and the contributory drainage area shall not be in excess of seven hundred (700) acres in any portion of the State southerly and easterly from such main line tracks. However, impoundments created by diverting water from an existing watercourse to an off-site storage or bypass pond may be constructed without regard to the watershed area of the stream from which water is diverted, except that the directly contributing watershed area shall not be in excess of one hundred (100) acres.

If a grass covered spillway is used, the maximum velocity of the flow of water over the spillway shall not be in excess of an amount that will produce scouring, as determined in each instance by the State Soil Conservation Committee. A spillway shall not be constructed on an artificial embankment or made-fill, but shall be cut only from natural and undisturbed earth, seeded or sodded and compacted by rolling.

The freeboard of the dam or embankment, measured upward from the highest spillway overflow level, shall be at least equal to frost depth plus one foot, or to wave height plus one foot, whichever is the greater, except that in no event shall it be less than thirty (30) inches.

Any limitation on contributing watershed area, depth of water, and water surface area shall not be construed to apply to impoundments created entirely by excavation below the existing ground level, these being known generally as dug-out ponds. Also, ponds which exceed any of the limitations described in this subsection may be constructed in locations where there are no downstream hazards, if approved in each instance by the Department.

Prior consent in writing for the construction of any such pond shall be obtained from all downstream owners within a distance of one thousand (1000) feet downstream from the proposed structure, such consent to be a part of the application for permission to build the pond or embankment.

The plans and specifications for any proposed pond or embankment shall be

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submitted in advance to the Department for review, to ascertain that they conform to the provisions and requirements of this subsection. All construction work shall be under the continued supervisory authority of the State Soil Conservation Committee or of other persons satisfactory to the Department, to assure that it conforms to the provisions and requirements of this subsection. (An. Code, 1951, § 669; 1939, art. 96B, § 5; 1933, ch. 526, § 5; 1950, ch. 72; 1957, ch. 317, § 1.)

Effect of amendment.—The 1957 amendment substituted "Department of Geology, Mines and Water Resources" for "Water Resources Commission" and "Department" for "Commission" in subsections (a) and (b) and added subsection (c).

§ 722. Permits for conduits, pipes, etc., pertaining to Potomac River.

It shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political subdivision of the State to construct, reconstruct, change, or make an addition to any conduit, pipe line, wire cable, trestle or other device, structure or apparatus, in, under, through or over the bed or waters of the Potomac River, without obtaining a permit therefor from the Department of Geology, Mines and Water Resources. The obtaining, use and holding of such a permit shall be subject severally to the provisions concerning permits found elsewhere in this subtitle. (1957, ch. 757.)

§ 723. Maps, etc., to accompany applications for permit.

Each application for a permit required by this subheading shall be accompanied by maps, drawings, and specifications of such proposed use or waterway obstruction, or of the said changes, additions, or repairs, proposed to be made, and such other data and information as the Department may require. (An. Code, 1951, § 670; 1939, art. 96B, § 6; 1933, ch. 526, § 6; 1941, ch. 508, § 12A.)

§ 724. Hearing on application for permit for appropriation, construction, etc.

As soon as convenient after the filing with the Department of any application for a permit to appropriate or use any waters of the State, or to construct or reconstruct or repair any reservoir, dam or waterway obstruction, in any waters of the State under the provisions of this subheading, the Department shall set a day for a public hearing upon said application. The applicant shall give notice to the public of such application and hearing, either in the manner prescribed by the Department, or by publication once in each week for two successive weeks prior to said hearing in a daily newspaper published in the city or cities, county or counties, which the Department shall determine may be directly affected by the proposed appropriation or use, or construction, reconstruction or repair. The county commissioners of each such county, the mayor or chief executive officials of each such city and the proper officials of any interested agency of the State, or political subdivision thereof, shall also be notified by the applicant by registered mail. In the public notice of such application, the date, place and time fixed by the Department for the public hearing on said application shall be stated. At such public hearing, the applicant and any other interested person or corporation, municipal or private, shall be given an opportunity to present facts, evidence and arguments for or against the granting of said application. In case of emergency, or the making of minor repairs, the Department may, upon written or oral application, grant applications to repair any reservoir, dam or waterway obstruction without notice or hearing; provided, however, that repairs necessary to save life or property may be made without such application, but notice thereof shall be given promptly to the Department. (An. Code, 1951, § 671; 1939, art. 96B, § 7; 1933, ch. 526, § 7; 1941, ch. 508, § 12A.)

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§ 725. When permit granted; conditions of grant.

Before acting on any application the Department shall weigh all of the respective advantages and disadvantages to the public and shall make all appropriate investigations. If the Department shall be of the opinion from all of the evidence before it that, in pursuance of the policy of the State regarding its water resources herein declared, the plans of the applicant provide for the greatest practicable utilization of the waters of the State and will adequately preserve public safety and will promote the general public welfare it shall grant the permit to appropriate or to use the waters, or to construct, reconstruct or repair the proposed reservoir, dam, or waterway obstruction, or to accomplish any combination of these objects. But if the Department be of the opinion, from the evidence before it, that the proposed appropriation or use of State waters or that the proposed construction is inadequate, wasteful, dangerous, impracticable, or will be detrimental to the best public interest, the Department may reject such application or it may suggest such modifications of the proposed plans as it deems sufficient to protect the public welfare and safety. In granting any permit authorizing any use or appropriation of water, or the construction or alteration of any reservoir, dam or waterway obstruction, the Department may include in the grant thereof such conditions, terms and reservations with respect to the character, amount, means and manner of such use or method of such construction as it may deem reasonably necessary to preserve the proper control in the State and to insure the safety and welfare of the people of Maryland. It shall be unlawful to appropriate or use any waters of the State, or to construct or begin the construction, or to make or begin any change or addition, or reconstruct or repair, any reservoir, dam or waterway obstruction, except in accordance with the terms, conditions, regulations and restrictions of such permit; and such rules and regulations, with regard to said constructions, changes, additions, or repairs as may be prescribed by the Department. The Department may determine and specify in each permit granted for the construction of a dam or other waterworks what provisions, if any, should be made for the passage of fish. (An. Code, 1951, § 672; 1939, art. 96B, § 8; 1933, ch. 526, § 8; 1941, ch. 508, § 12A.)

§ 726. Notice to repair or remove reservoir, dam or obstruction.

Upon complaint, or upon its own initiative, the Department shall have power to cause an investigation or examination to be made of any reservoir, dam, or waterway obstruction now existing or hereafter constructed. If the Department shall determine that such reservoir, dam or waterway obstruction is unsafe or needs repair, or should be removed as being unsafe and not susceptible of repair, the Department shall, in writing, notify the owner or owners thereof, to repair or remove the same, as the exigencies of the case may require; such work to be commenced and proceeded with to completion within such reasonable time as may be prescribed in such notice by the Department. (An. Code, 1951, § 673; 1939, art. 96B, § 9; 1933, ch. 526, § 9; 1941, ch. 508, § 12A.)

§ 727. Time limit for beginning and completing work.

The Department shall prescribe a time limit of not more than two years from the granting of any permit in which time the construction, reconstruction or repair must be begun and or the appropriation or use of water must be made. The Department shall also prescribe a time limit of not more than five years to begin from the granting of any permit in which all construction, reconstruction or repair of reservoirs, dams, or waterway obstruction must be completed. Provided, however, that either or both of these time limits may be extended for good cause in the discretion of the Department. (An. Code, 1951, § 674; 1939, art. 96B, § 10; 1933, ch. 526, § 10; 1941, ch. 508, § 12A.)

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§ 728. Orders; rules and regulations.

The Department is hereby authorized and empowered to make such rules and regulations, and issue such orders as may be proper for effecting the purposes of this subheading. (An. Code, 1951, § 675; 1939, art. 96B, § 11; 1933, ch. 526, § 11; 1941, ch. 508, § 12A.)

§ 729. Appeals.

Any person in interest may appeal from any determination of the Department to the circuit court of any county or to the Circuit Court of Baltimore City, in the manner and mode prescribed by § 81 et seq., of Article 78, for appeals from the Public Service Commission of Maryland, and all the provisions of law, so far as applicable, relating to appeals from the Public Service Commission to the circuit courts and to the Court of Appeals shall apply to appeals from the Department of Geology, Mines and Water Resources. (An. Code, 1951, § 676; 1939, art. 96B, § 12; 1933, ch. 526, § 12; 1941, ch. 508, § 12A.)

§ 730. Penalty.

Any person or persons, partnership, association or corporation, public or private, that shall do or cause to be done any act or thing contrary to or required by the provisions of this subheading, or that shall fail, neglect or refuse to do or cause to be done any act required by the provisions of this subheading, or that shall violate or fail to comply with any order of the Department or which due notice shall be given; or that shall violate any of the provisions of this subheading, shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars, or in the discretion of the court, such person or persons, or the members of such partnership or association, or the officers and directors of such corporations, public or private, as the case may be, sentenced to imprisonment for a period not exceeding one year, either or both, in the discretion of the court. (An. Code, 1951, § 677; 1939, art. 96B, § 13; 1933, ch. 526, § 13; 1941, ch. 508, § 12A.)

§ 731. Enforcement by injunction.

Upon application of the Department, verified by oath or affirmation, the circuit court of any county, or of Baltimore City, sitting in equity, may by injunction, enforce the compliance with, or restrain the violation of, any order or notice, or rule or regulation, of the Department made pursuant to the provisions of this subheading, or restrain the violation or attempted violation of any of the provisions of this subheading. The Attorney General of Maryland shall be counsel to the Department of Geology, Mines and Water Resources. (An. Code, 1951, § 678; 1939, art. 96B, § 14; 1933, ch. 526, § 14; 1941, ch. 508, § 12A.)

§ 732. Effect on jurisdiction of federal authorities and other laws of Maryland.

Nothing in this subheading shall be construed so as to interfere with the exercise of the lawful jurisdiction of the government of the United States, or its duly constituted agencies, over the waters of the State of Maryland. Nor shall this subheading be construed to amend or repeal any law of the State of Maryland relating to the Public Service Commission, and the State Department of Health of Maryland, relating to water and water structures, or any act or parts of acts not inconsistent with the provisions of this subheading; nor shall it be construed so as to impair any riparian or other vested right. Nothing contained in this subheading shall be construed to amend, repeal, limit, impair or alter any

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right, power or privilege heretofore granted by the General Assembly of Maryland to the mayor and city council of Baltimore, to appropriate or use any of the rivers, streams or waters in the State of Maryland for the purpose of augmenting and improving the municipal water supply of Baltimore City; nor shall it be construed to prohibit, limit, impair or alter any particular use in existence on January 1, 1934, of any stream or body of water by any person, partnership, association, or corporation, public or private, unless such use is thereafter abandoned. (An. Code, 1951, § 679; 1939, art. 96B, § 13; 1933, ch. 526, § 13.)

§ 733. Severability.

In the event that any court of competent jurisdiction should declare any section or part of a section of this subheading to be invalid, the remainder of the subheading shall not be invalidated thereby, but shall remain in full force and effect. (An. Code, 1951, § 680; 1939, art. 96B, § 16; 1933, ch. 526, § 16.)

§ 734. Additional law.

This subheading is in addition to and not in substitution for any existing laws of the State of Maryland. (An. Code, 1951, § 681; 1939, art. 96B, § 17; 1933, ch. 526, § 17.)

WELL DRILLERS

§ 735. Rules and regulations.

The Department of Geology, Mines and Water Resources, hereinafter called Department, in furtherance of its general powers of supervision over the natural resources of the State and their conservation for public use and in furtherance of its specific responsibilities for the proper conservation, allocation and development of the underground waters of the State is hereby authorized and empowered to make effective the provisions of this subheading and to adopt such rules and regulations as may be proper for this purpose; provided, however, that nothing in this subheading shall be construed to deny to any municipality, county, or other political subdivision of the State the right to adopt and enforce such additional rules and regulations not inconsistent with the provisions hereof, nor shall anything in this subheading be construed to limit the powers of the State Board of Health or of any other State agency having jurisdiction of and supervision over the public and potable water supplies of the State. The rules and regulations so adopted may recognize a variation in the primary use of wells and a variation according to locality in the manner of construction and of the materials penetrated. (An. Code, 1951, § 682; 1945, ch. 325, § 18.)

§ 736. License—Required.

No person shall hereafter be in responsible charge of well drilling until he shall have received a license as a well driller from the Department. (An. Code, 1951, § 683; 1945, ch. 325, § 19.)

§ 737. Same—Authority to issue.

The Department is hereby authorized and empowered to grant and issue licenses to persons desiring or intending to engage in the trade, business or calling of well driller within the boundaries of the State in the manner and upon the terms and conditions hereinafter provided. (An. Code, 1951, § 684; 1945, ch. 325, § 20.)

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POTOMAC RIVER

HEARINGS AND MARKUP

BEFORE THE

SUBCOMMITTEE ON BICENTENNIAL AFFAIRS, THE ENVIRONMENT, AND THE INTERNATIONAL COMMUNITY

AND THE

COMMITTEE ON THE DISTRICT OF COLUMBIA HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

THE STATE OF THE POTOMAC RIVER, 1976, AS TO WATER SUPPLY AND WATER POLLUTION

AND ON

H.R. 15434

TO PROVIDE FOR EQUITABLE WATER RATES AND ENCOURAGE WATER CONSERVATION

JUNE 2, 10, 17, 18, 24, 25; SEPTEMBER 9 AND 16, 1976

Serial No. 94-20

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U.S. GOVERNMENT PRINTING OFFICE

24-171 WASHINGTON : 1977

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OVERSIGHT HEARINGS ON THE STATE OF THE POTOMAC, 1976

WEDNESDAY, JUNE 2, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE BICENTENNIAL,
THE ENVIRONMENT AND THE INTERNATIONAL COMMUNITY
OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room 1310, Longworth House Office Building, Hon. Herbert E. Harris, II, chairman of the subcommittee, presiding.

Present: Representatives Harris, Fraser, and Gude.

Also present: Hugh B. Calkin, subcommittee staff consultant, William Chandler, minority staff assistant, and James T. Clark, legislative counsel.

STATEMENT OF REPRESENTATIVE HARRIS

Mr. HARRIS. The subcommittee will come to order.

This is the first in a series of oversight hearings on the state of the Potomac in 1976. The Chair would like to point out that the subcommittee's objective is not for another study or a report, but to have some specific findings in terms of where we are in both water supply and water pollution in the metropolitan area, especially as it relates to the Potomac.

Ten years ago this summer a near crisis occurred as the Potomac River flow dropped to just 388 million gallons at Little Falls. This is 50 million gallons less than the Washington area demands on a typical peak day. Today, 10 years later, we are still unprepared for a similar event.

No new sources of water have been established. No new agreements drawn among State or counties. The Federal Government, the biggest single user in the Washington metropolitan area, has made little effort to implement the use of water saving devices.

It appears that one of the primary reasons for this lack of action is the fragmented and piecemeal approaches to supplying and treating water for the growing Washington area. Virginia, West Virginia, Pennsylvania, Maryland, and the District of Columbia, plus 20 Federal agencies, several regional bodies and 39 counties all have some degree of official jurisdiction over the Potomac and its tributaries.

The purpose of these hearings is to identify and air the conflicts between these jurisdictions that may be preventing greater progress toward solving supply problems and improving water quality. We

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hope to impress upon State and local officials that if ways are not found to work out solutions at the local level, very soon the entire problem is liable to be in the hands of some federally created agency that does not need consensus to make decisions.

For these reasons, specific issues such as various techniques for sludge disposal or whether AWT's should be located above water intakes will not be analyzed at these hearings. We do expect, however, that several issues may arise that will lead to future indepth hearings either by this committee or be referred to another congressional committee.

We want to determine if any progress is being made in attacking the well-known Potomac problems.

In the area of supply we know the answer is no, unless you measure progress in terms of the number of studies completed. The only thing "concrete" after decades of studying this problem is Bloomington Dam and even that isn't complete. There are many actions that might be taken at State and local levels in the best interest of the public that do not require dams, just cooperation. We would like to know what is happening.

We will examine what COG and local jurisdictions are doing to encourage water conservation, including plumbing code changes to require water saving fixtures; reuse of water; pricing policies.

The U.S. Army Corps of Engineers has proposed a number of alternative projects to increase supply. We want to see if any of these are patently unfeasible. Also, we want to know how the corps generated its demand projections and whether they are accurate.

We will look into the seriousness of the supply situation. People have been predicting shortages and dire consequences for years. We will try to determine what kinds of shortages could occur, how they would be coped with under the current jurisdictional setup, and what impacts these shortages would have on day-to-day living.

The subject of water quality is even more complicated. Here, some progress is being made but it depends on where you are on the river, what you are using the water for, and in some respects what risks you are willing to accept.

The Water Pollution Control Act Amendments were passed in 1972. What progress have we made in achieving any of the objectives set down? Pollution from mining, agriculture, and forestry, rather than industry, is known to be the major problem in cleaning up the Potomac upstream.

There is no indication that any program has even been proposed to address this. We would like to determine why not. Because disputes over sludge disposal sites can't be resolved, Blue Plains is now dumping more sewage into the Potomac because they have no other place to put it.

What is the impact of this on the estuary? Is there no other short term solution that might be worked out among the jurisdictions?

I would also like to make a personal note of how proud I am to have as the ranking minority member, my colleague from Maryland, Mr. Gude. Mr. Gude has worked in the Potomac area and has accumulated a wealth of knowledge and sensitivity to the problems of the metropolitan area.

Mr. Gude?

STATEMENT OF REPRESENTATIVE GUDE

Mr. GUDE. Thank you, Mr. Chairman.

Mr. Chairman, I want to commend you in calling these hearings. It has been a pleasure to find the concern about the Potomac River is indeed on the Maryland side and the Virginia side and that we have worked together in setting up these oversight hearings. I believe this is probably the first time there has been a comprehensive oversight survey of a region served by one principal body of water from the standpoint of water supply and sewage disposal.

The responsibility of the activities of the several governmental jurisdictions in the region is where we are headed. As you pointed out, we are not about to propose another study. I think it is our intention that these hearings and others serve the useful function of encouraging and facilitating progress in the resolution of the water supply and water quality problems which continue to plague the region.

I particularly wish to encourage General McGarry and the U.S. Army Corps of Engineers to give us a frank assessment of the water supply situation and his judgments on how to resolve outstanding problems including any needs for new legislative authority or Federal funds.

General, you have earned a commendable reputation as District Engineer and the subcommittee welcomes your advice and counsel. There are five major topics which I believe we will examine in the hearings.

First, we need a precise understanding of the seriousness of the supply situation and what probable shortages mean for the metropolitan area.

Second, we need to know how well prepared the area is to cope with a severe water shortage caused by drought. Third, we need to look at the planning of the past 20 years so as to identify the weaknesses of the planning.

With all the planning and work, we can only identify a dam on the main stem which is not yet completed. Pardon the pun, that is the only concrete example of progress.

Only if we candidly discuss these things can we aspire to change the situation for the better. We need to understand the viability of demand projections. It appears that substantial water savings could be obtained. If so, clearly we should move in this direction.

Finally, we need to establish an agenda of actions needed in the immediate near term and more distant future to move forward on this problem. It is important to determine which agencies at which level of government are responsible for these actions and to see that they do go ahead and act.

Again, thank you, Mr. Chairman, for calling these hearings. I think they will be very fruitful for all concerned.

Mr. HANNA. Thank you very much, Mr. Gude. Our witness today is Brigadier General Robert S. McGarry, U.S. Army Corps of Engineers. General McGarry, we are very pleased that you could appear here today. We are pleased at the comprehensiveness of your statement. We note that it is broken down into sections. The subcommittee would be pleased to hear you present it however you want to

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as far as making the points that you feel the corps would like to make at this point in time.

STATEMENT OF BRIG. GEN. ROBERT S. McGARRY, U.S. ARMY CORPS OF ENGINEERS, ACCOMPANIED BY JAMES E. CREWS, CHIEF, URBAN STUDIES BRANCH, BALTIMORE DISTRICT; WILLIAM E. TRIESCHMAN, JR., CHIEF, PLANNING DIVISION, BALTIMORE DISTRICT; SARAH J. TAYLOR, STAFF, URBAN STUDIES BRANCH, BALTIMORE DISTRICT; AND HAROLD NELSON, ASSISTANT CHIEF, PLANNING DIVISION, BALTIMORE DISTRICT, U.S. CORPS OF ENGINEERS

General McGARRY. What I propose to do, sir, is to answer the six questions that you sent me in the letter and then any other questions I can elaborate on. The way I will do this, I have provided you a handout that is exactly the same as this charter here except on top of it is a financial summary of the project.

If you will turn to the second page, I will proceed. The first question was the status of projects in the Potomac, an overview of the news study, an overview of the metro study, some comments on the control of supply versus the control of water demand, assessment of the costs of not having adequate water for social and economic needs, and some comments on the overall regional management of water supply, waste water in the area.

STATUS OF PROJECTS ON THE POTOMAC RIVER

First, turning to the status of projects, Bloomington Reservoir is the only project actually under construction at the present time. It was authorized in 1962. The current estimated cost is $151 million. I would like to point out that of that, only one-third is for water supply. The balance is flood protection, recreation, and stream enhancement. That $50 million will be repaid by the users of the water.

We have an agreement with the State of Maryland to reimburse the total cost of the water supply. It comes out to $35 per million gallons of water or 3/1000ths of a cent a gallon.

The project is under construction, about one-third complete. However it is not fully funded. The funds provided in the 1976 and 1977 budget are not sufficient to maintain progress. The completion date will slip to 1981 with the level of funding that is in the President's budget at the present time.

When it is brought on line in November 1982, it will provide 137 million gallons of water per day additional. This in our estimate would be enough to meet the 7-day demand of about the 1980 time frame.

There is no known opposition to the project. In fact, it seems to be supported fully by everyone concerned, environmental groups, and the Congress.

ESTUARY

Next, the estuary. As the Potomac meets the Chesapeake Bay, there is a natural reservoir of water formed called the Estuary. Most of

it is not used. Most of it could be used as a water supply. There are serious health and safety problems that concern us.

We have two projects involving the Estuary, using it as a source of water. First is an emergency pumping station. This project was authorized in 1971 as part of the D.C. budget, not the public works budget, the D.C. budget. We proposed to build a pumping station that would enable us to take 100 million gallons per day out of the estuary on an emergency basis, mix it with other water sources and use it for a very short-term period.

The pumping station cost $1½ million. Funds to initiate construction are included in the D.C. budget that is before the Congress at the present time. We expect them to be appropriated. We will start construction shortly thereafter. If all goes well, it should be on line by next summer, the summer of 1978.

It will give us a capability of 100 million gallons per day on an emergency basis. I wish to emphasize, an emergency and short-term basis. This is not a long-term solution and it will be a critical decision we will have to make when we put it into use. That project is fully supported.

PILOT TREATMENT PLANT

The second project concerning the Potomac is the construction of a pilot treatment plant to verify whether the estuary can be used as a long term, safe, dependable, economical source of water for the D.C. area.

The Omnibus Act of 1974 authorized the Corps to build that plant and test it for a 3-year period of testing. We hope that it will prove that the estuary could be used as a viable source of water for the District of Columbia.

It will take about 2 years to build the project. Funds to start work are not included in the President's budget for fiscal 1977. Unless there is a change, the earliest this project could start would be fiscal 1978. As I have stated, it takes a 3-year period of testing and our testing program and the design of the plant will be reviewed by National Academy of Sciences and the National Academy of Engineering.

They have approved our design and our concept. We would hope they will endorse our finance. To me, this is probably the single most important project to eventually resolve D.C. water supply. Every study we have made, when we finish, the question has been asked why not use the estuary? It seems to be environmentally acceptable and a cost-effective way to supply water.

Until we have this plant to verify it is an acceptable, safe solution. I don't believe we will ever end this apparently endless cycle of studies. As I say, we are prepared to start work or go out to bids as early as December of this year subject to the availability of funding. I would like to repeat.

This is the most important project to eventually resolve the problem in my opinion.

VERONA LAKE

Verona Lake, the reservoir project in the vicinity of Staunton, Va., was also authorized in 1974 and it, when completed, would solve two water supply problems. It will meet Augusta County, Va.'s water

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needs through 2020 and with Bloomington on line, it would meet D.C. needs through 1990.

Estimated cost is $55.1 million. Congress has appropriated funds for the phase I design. That is underway and will be finished next fall, September of 1977. The act that authorized the lake requires us to report back to the Congress after completing phase I, which we will do.

Therefore the second phase of construction, initiation, depends on congressional review of our phase I project. There are some restraints on the project but I believe they can be resolved. There are some citizens in the vicinity of Augusta County, Staunton, Va., who oppose the project.

But the political leadership and the Commonwealth strongly support it. Second, there is a problem that has developed recently in that the constitution of the Commonwealth of Virginia seems to prohibit Virginia from entering into the long-term hold and save clauses of a normal government agreement.

Virginia is working on this and I think will find a way to solve the problem.

The third constraint would be a technical constraint in that there are problems created by agricultural runoff upstream from the damsite and some sewage treatment plants upstream of the damsite that will be addressed in detail in our phase I study. That is a technical problem and can be resolved. I am sure.

Sixes Bridge Lake

Sixes Bridge Lake was also authorized. It would increase the flow in the Monocacy in Maryland and solve Frederick County's needs through 2022 and with Bloomington and Verona, it would meet D.C. needs through 1996.

The total cost is $42.1 million. It is authorized but we have no funds for any design or investigation at any time. There are serious political constraints on this project. In my opinion there is no point in proceeding any further with Sixes Bridge. I say this because the Frederick County officials and citizens oppose it and recently the State of Maryland withdrew their strong support of the project.

Two-thirds of the cost of this project has to be a non-Federal expense. Thus if they are not in agreement with the project, they are certainly not going to sign the cost-sharing agreement and in my opinion, I would suggest and I intend to forget this until such time as Frederick and Maryland realize that they have a water problem and would ask us to open up the issue.

I do point out to the people of Frederick, Md., that they have a water problem more serious than the D.C. water problem and there is no apparent solution in the future for them.

Mr. Hannis. Does that pretty much conclude your comments with regard to the projects?

General McGarry. Yes, sir. Those are the projects that are authorized and underway at the present time.

Mr. Hannis. I wondered if we might interrupt you at that point for some questions?

General McGarry. Sure.

Mr. HARRIS. Congressman Gude?
Mr. GUDE. You go ahead.

BLOOMINGTON DAM

Mr. HARRIS. With regard to the Bloomington Dam project which was authorized in 1962 and I think estimated to be completed in 1981, why is this project taking 14 years to get to one-third completion?

General McGARRY. More than anything else, sir, it is a matter of appropriation of funds. We did not get funds to start it—it was 1973 when funds were first appropriated. Construction did not get underway in earnest until about that time.

It has not been funded at a rate to keep it going as rapidly as it could. Our capability for 1977 is $18.3 million versus $11.8 million in the budget. That would bring it back to the 1980 completion date. It slipped 3 years in the past 3 years.

Mr. HARRIS. That slippage was strictly because of the amount of funding provided for the project?

General McGARRY. Yes, sir.

Mr. HARRIS. I am trying to remember now. Why did the administration, Congress, wait until 1973 to fund the project? It was authorized in 1962.

General McGARRY. I am not certain, sir. That goes back before my time and I would have to look it up. As I recall—it probably never would have been started had it not been for the Appalachian project.

Mr. HARRIS. I am frankly impressed by the project, probably because it is not in Virginia.

More importantly, I note that your estimate there is 137 Mgal/d. I use a rule of thumb. We are talking about 1⅓ million people, roughly—I don't know whether you use 100,000 or 110,000—but as a matter of fact we used to use about 90,000 on that, but you are talking about a lot of people, aren't you?

General McGARRY. Yes, sir, but our shortage will be that or more if we had a repeat of the 1933 drought as compared with demand today.

Mr. HARRIS. At any rate, we have no known opposition to the project. We are capable of making a substantial contribution to the water supply. The 137 mgal/d is no drop in the bucket as far as water supply is concerned. We did not fund it until 1973.

General McGARRY. More than anything else, it is that rate of funding, sir.

Mr. HARRIS. I thought I heard you say that what you needed was $18 million this year and what you got was $11 million?

General McGARRY. Yes, sir, $11.8 million is included in the President's budget. Our capability is $18.3 million.

Mr. HARRIS. Having had some experience with construction programs, I am always impressed at how much money you save when you start a project and go ahead and finish it.

General McGARRY. That is correct, sir. Delays will cost us about $9.1 million in benefits and $7½ million in first costs—benefits lost.

Mr. HARRIS. $7½ million is strictly on escalation?

General McGARRY. Yes, sir.

Mr. HARRIS. $7½ million for how long a delay?

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General McGarry. For a year's delay. Construction escalation is running between 8 and 10 percent.

Mr. Harris. By cutting the funding from $18 million to $11 million you are increasing the cost by $7 million?

General McGarry. A year's delay will increase the cost by $7 million. More than that, we will lose $9.1 million in benefits.

Mr. Harris. I am trying to weigh the economy here. By cutting the funding from $18 million to $11 million which is a $7 million cut, you also increase the cost by $7 million. So that is about 100 percent increase. With wisdom like that, we will settle the water supply situation here, I am sure.

I was going to go to the upper estuary, Mr. Gude, but do you have any questions on Bloomington?

Mr. Gude. Thank you, Mr. Chairman. If you could have funding for Bloomington at wheatever rate you desired, at what date could you complete the project?

General McGarry. We could get it back to November 1980. We could recover the year of loss.

Mr. Gude. That is the earliest possible date?

General McGarry. Yes, sir.

Mr. Gude. Why couldn't you make it earlier?

General McGarry. With the amount of work that remains to be done—there is the construction season and I am planning on not paying premium cost. We have $77 million worth of construction remaining and it will take about that amount of time.

We have a short construction season down there.

Mr. Gude. It is physically impossible to construct Bloomington Dam more rapidly than November 1980?

General McGarry. No, sir, of course we could finish it faster by going to overtime and premium payments. I am discussing using normal operating procedures, what we feel our capability, the contractor's capability would be during normal construction season.

You could probably shave 3 to 6 months off that if you went to premium time.

Mr. Gude. Only 3 to 6 months?

General McGarry. Yes, sir, I would not recommend going to that. If there were one or more features that were holding it up, that would be a possibility but that is not the case. The next major action we have on that dam is—we have not awarded the contract for the embankment. We had planned to advertise and award that this spring and we can't because of the shortage of funds.

We are postponing it a year. If a decision were made to increase the funding capability, we could go out in the street and get that project started.

Mr. Gude. Having seen the archeological research that was done on Bloomington and also being familiar with the area, the question arises, in regard to possible upstream impoundments, why the corps has not been able to identify other areas where there would not be agricultural interests or historic sites or cities or small towns that would be disrupted by the construction of impoundments?

SIXES BRIDGE AND VERONA LAKE

[illegible] have Sixes Bridge which has problems and Verona that has some [illegible]ns.

General McGARRY. For example, Sixes Bridge and Verona sites were selected to solve two problems, the local water supply problem plus the D.C. problem. I recommend that we abandon Sixes Bridge because the locals don't want our help.

Yes, there are sites that have been looked at and in our Washington metropolitan study we will open them up again since we are not going to solve the problem. But we are kind of back into this situation with the desirability of solving two problems at the same time.

Both of those reservoirs would provide flood protection and recreation benefits that at one time they indicated they wanted.

CATOCTIN RESERVOIR

Mr. GUDE. What is the status of the Catoctin Reservoir?

General McGARRY. That was not a corps recommendation at any time although we have been blamed for it. It was studied by the Council of Governments through a private firm which identified Catoctin. We also discussed it in the NEWS report. It is violently opposed by the citizens, very, very, very strongly opposed.

Mr. GUDE. I agree with you.

General McGARRY. Again, that would be a reservoir site that I would question the wisdom of proceeding much further on with that kind of opposition. We are just delaying the process if we don't have strong support.

Mr. GUDE. That is one of the more beautiful tributaries in the Potomac. You mentioned that the emergency pumping station would give us 100 million gallons a day, starting in the summer of 1977. You said that there are no problems as far as any agencies are concerned.

Have the local governments and also the Department of the Interior signed off?

General McGARRY. Everybody has signed off. In fact, we received accolades from every agency and the national capital on the design of the project because it will look like a pile of rocks. It will blend in. [Laughter.]

Mr. GUDE. It is esthetically pleasing.

Mr. HARRIS. Isn't it amazing what science can do?

General McGARRY. When we started, someone said why don't you make it look like a castle and fine until we got to the National Capital Planning Commission and their main objection was that it looked like a castle and we had to start over again.

Mr. GUDE. You said there were health problems there and I was wondering exactly what is being anticipated, heavy metals?

General McGARRY. Viruses are the main thing, they are concerned about. Where we are putting the emergency plant is in the head upstream portion of the estuary and all our tests indicate that we won't have a problem. It will be very carefully monitored and used on an emergency basis.

Mr. GUDE. I misunderstood you. I know there is a distinct difference between the location of the pilot treatment plant and the emergency pumping station. The emergency pumping station is going to be in Sixes, upper limits of the estuary.

But you anticipate no problems in treating the water from the emergency pumping station?

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General McGARRY. That is correct, sir, on a short-term basis. As a sustained supply, if we did not have other sources to mix with it, we would have concerns. It will be an emergency operation when we put it into operation. We will have initiated the water conservation measures by the Council of Governments, lawn sprinkling will be turned off, there will be no outside uses of water and we will be to the point where demand is approach just enough to keep the water mains full.

At that time we will consult, determine if it is safe and bring it on line hopefully just for a matter of days.

Mr. GUDE. You say a matter of days. Three days? Five days?

General McGARRY. I hope we would not have to use it over 3 to 5 days.

Mr. GUDE. In handling this as far as viruses are concerned, one of the steps you will utilize is the dilution of the intake from the upper estuary?

General McGARRY. Yes, sir. I would not want to use it as the sole source. It will be mixed with the water from the Potomac.

Mr. GUDE. So the resultant mixture would be very much the same as what you are receiving now?

General McGARRY. Yes, sir.

Mr. GUDE. Thank you, Mr. Chairman.

EMERGENCY PUMPING PLANT

Mr. HARRIS. I wanted to check with regard to the upper estuary pumping station. It was authorized in 1971?

General McGARRY. The emergency pumping plant, yes, sir.

Mr. HARRIS. Here again, it is 5 years later. Why has no construction started on that?

General McGARRY. There has been a struggle to get funds for both the design and a struggle to get approval of the design and to get funds for construction.

Mr. HARRIS. Just waiting for funding, right?

General McGARRY. At the present time, yes, sir. It is in the D.C. budget. They have supported us fully on it. I expect it to be funded.

Mr. HARRIS. You say it is in the 1977 D.C. budget or the 1976?

General McGARRY. The D.C. 1976 budget. We would expect to get funds this fall.

Mr. HARRIS. If that held, how soon could it be on line?

General McGARRY. Next summer, sir.

Mr. HARRIS. Have you had trouble with the design of the pumping station?

General McGARRY. Not really, sir. We had trouble getting a design — not trouble. We had to redesign it for the National Capital Planning and Park Service but that we have done.

Mr. HARRIS. Is that the design to look like a castle?

General McGARRY. Yes, sir. It now looks like a pile of rocks.

Mr. HARRIS. Your story reminded me of the New York high school that rented the ballroom of the most famous hotel in New York and after a week of work by the students decorating the ballroom, it looked just like a high school gymnasium. Are all the legal requirements satisfied?

General McGARRY. Yes, sir. The environmental impact statement has been coordinated. All agencies have concurred.

Mr. HARRIS. Your flow versus demand data for 2020, how about 1976 or 1978 or 1980, your more recent projections? This would be helpful to sell all interests on the need for and the benefits of the emergency pumping station.

Have you developed figures for more recent years?

General McGARRY. You mean the closer in years?

Mr. HARRIS. Yes.

General McGARRY. It is a very difficult question to answer, sir. I have to know whether we are going to have a drought or not. In normal summers such as last summer and what we expect this summer, there will be more than adequate water in the Potomac. There is no indication as we set here today that we will have a water shortage this summer.

If it follows the pattern of the 1966 drought or the 1933 drought, the drought develops over several years. Each summer gets worse. The reason we want the plant on an emergency basis is the fact that as you said in your opening testimony, the peak demand has already exceeded the recorded low flow. When those two occurrences happen in the same day, we have to have something available.

ESTUARY PILOT TREATMENT PLANT

Mr. HARRIS. Now moving to the estuary pilot treatment plant, it was authorized in 1974 and the design was to be completed in 1977. If this was funded, could it be on line in 1979?

General McGARRY. The design will be completed this fall, November-December of 1976 and the construction period is 24 months. If funds were added to the President's budget for 1977 and authorized by October, November, we would have it in existence about 24 months after that.

Mr. HARRIS. That would be 1979?

General McGARRY. Yes, sir. Then there is a 3-year testing program directed by Congress and we concur. We are talking 5 years at the earliest that we will be able to report back and say yes, you can use the estuary or no, you can't.

Mr. HARRIS. Explain to me what the relationship of the emergency pumping plant and the treatment plant is. Are the two of them interrelated?

General McGARRY. No, sir, not really. The emergency station we recommended and carried through the D.C. budget channels because we know if we have a drought we have a serious problem.

The pilot plant is a first step in using the estuary as a long-term solution to the problem. This is not on a 3- to 7-day basis but 100 million gallons per day all year around. Theoretically they are not related at all.

Mr. HARRIS. Is the Washington Aqueduct water treatment plant adequate to treat estuaries now?

General McGARRY. Not on a long-term basis, no.

Mr. HARRIS. Here again you would have to get a mix and then do it only on a short term basis?

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General McGARRY. Yes, sir, and with very careful monitoring to protect the health of our water customers. In the long term estuary plant, we will use water treatment techniques that are pushing the limit of technology today. They are not in the Washington Aqueduct at all.

Mr. HARRIS. Has an environmental impact study been done on any of these projects?

General McGARRY. Yes, sir.

Mr. HARRIS. On both?

General McGARRY. On the pilot estuary treatment plant we made an environmental assessment and determined it will not have a major impact and a statement is not necessary. The impact statement has been filed on the emergency plan.

Mr. HARRIS. What is the cost sharing report that I understood was going to be released in July?

General McGARRY. For the estuary pilot plant. In the report—as the report was going to Congress recommending the pilot estuary plant, the Office of Emergency Management and Budget objected to full Federal financing of that project and said that the local governments in accordance with water resources laws on the books should share in the cost of that plant.

The chief engineers said we would investigate that and come up with an appropriate formula before we started construction. We have considered several alternatives for cost sharing, coordinated with the Government's concern and we are finalizing the report.

But I went back to the chief engineers and we read the law carefully and there is some question now whether the act of Congress after the chief's report negated the requirement for that cost sharing or not.

We are looking into that. We may not publish a report. In all probability we will not. If we did recommend cost sharing, my recommendation would be that the Federal Government finance the initial construction and if the plant proves to be a viable alternative, that the cost for the pilot plant be spread out over a 50-year period as part of the total water solution to the metropolitan area.

Mr. HARRIS. Would this be sort of trail blazing research? Would it have application in any other place in the United States?

General McGARRY. Yes, sir. In my opinion it will have application to other parts of the United States that have estuaries that could use it. We will be testing some very advanced techniques for their safety and reliability. It is applicable throughout the country.

That is one of the reasons that we are looking hard to see whether cost sharing is appropriate or not.

Mr. HARRIS. At least in your mind there is some justification for the Federal Government going ahead with this project pretty much with its own funding.

General McGARRY. Yes, sir.

Mr. HARRIS. In other words, more or less a demonstration project?

General McGARRY. Yes, sir. If that is not acceptable, an alternative would be to spread this cost over the total solution of the water problem in the Washington metropolitan area. One of the acts authorizes funds to be provided to communities to develop advance techniques on a 75-50 basis.

That act indicates that yes, we will support advance techniques but it will be cost sharing. That is one of the reasons there is possibly a need for cost sharing.

Mr. HARRIS. Let me ask you, just to philosophize a minute here, how do you see the potential as far as the estuary is concerned vis-a-vis the total water supply?

General MCGARRY. I think the estuary is probably going to be the eventual solution for the Washington metropolitan area. I am personally confident that the plant will prove we can use it.

It is an environmentally acceptable way. My only reservation would be cost to treat the water. I would like to have a look at those.

Mr. HARRIS. You can't find out about those until you get a plant in there and start operating; isn't that right?

General MCGARRY. Yes, sir.

Mr. HARRIS. As far as volume is concerned, how do you see the potential? I can see the apparent appeal to you for the estuary being a workable solution. But in relationship with Washington's total water supply problem, do you see the potential in it as a total solution?

What kind of volume are you talking about here potentially?

General MCGARRY. We have identified two alternatives, one of 100 million gallons per day and the other of 200 million gallons per day. That is long-term use of estuary, either by directly using it or withdrawing it, treating it and pumping it upstream and allowing it to come down and having natural purification.

The estuary coupled with Bloomington and other possible connections seems to be the best quick solution to the problem.

Mr. HARRIS. It is a long-term solution, too?

General MCGARRY. Yes, sir. It would meet the needs through the year 2020, a combination of the Bloomington estuary and interconnections with Verona.

Mr. HARRIS. It almost seems like it would without Verona.

General MCGARRY. Yes, sir. The Verona solves more problems than the Washington metropolitan water supply. It is strongly supported by the Commonwealth of Virginia and it is in my opinion needed.

It is needed for Augusta and it is needed for recreation potential in that region. I think it will continue to be supported and we will move forward.

Mr. HARRIS. You mentioned that Virginia is having some constitutional problems with entering into a long-term undertaking as for cost sharing?

General MCGARRY. That is correct, sir.

Mr. HARRIS. It strikes me this is the same problem they ran into with regard to Metro. It strikes me a great deal of legal research went into that to figure out long-term legal contracts.

Are they going down that line?

General MCGARRY. Yes, sir, I believe they are. They are working on it. They know the requirement. They have indicated to me they definitely want to sign a contract with us when Verona is authorized and they will solve the problem, I believe.

Mr. HARRIS. I think there is some precedent, and I know the constitutional problem you are referring to but they have solved it before for projects that they want.

General MCGARRY. That is good news.

Mr. HARRIS. Mr. Gude?

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Mr. GUDE. Thank you, Mr. Chairman. In the existing plant at Dalecarlia, does the corps anticipate any new types of treatment? The treatment technologies that are being used now provide our water supplies but the corps has been testing viruses and heavy metals and carcinogens.

Does the corps anticipate using any new techniques or treatments there?

General MCGARRY. Not at the present time. We would like to replace the filters at McMillan. They are old and expensive to operate. But that is not a new technique. It is upgrading our capability. We will follow the EPA leadership on water quality for water supply.

If they establish criteria more stringent than exists today, then we would upgrade our plant. But we don't know of any requirements in that regard yet.

Mr. GUDE. Are the levels of purity that you are achieving at Delacarlia well within the limits of EPA's criteria or are they pushing those limits?

General MCGARRY. We are well within. There is no problem meeting any established criteria for water quality. We tend to think it is the best in the country. There are those who argue with us.

Mr. GUDE. I wondered if you could provide for the record current levels?

General MCGARRY. I would be happy to.

Mr. GUDE. Also, how they meet the EPA criteria. You mentioned you are going to employ new techniques in the estuary plant. Has the corps consulted with the National Academy of Sciences and with EPA in regard to what treatments are necessary?

General MCGARRY. Definitely, sir. The design of the pilot plant has been thoroughly reviewed by EPA and the National Academy of Sciences and the National Academy of Engineering and we made modifications as a result of their review and when it is built it will be exactly what we feel and they feel is needed.

Mr. GUDE. What techniques are going into the pilot plant, new techniques?

General MCGARRY. We will be using—comparing reverse osmosis with other types of filters. We will be using chlorination, ozonation—I am going to ask for some help. There will be ion exchange capability, carbon filters, and microscreening. The plant will have about three separate systems so that we will have the capability to compare one technique versus another. These are systems that the technicians in the National Academy of Sciences felt both were promising but needed more study.

So it is a sort of a dual or a trisystem that will give us the capability to compare.

Mr. GUDE. Could you supply us with a description of the three basic systems?

General MCGARRY. Yes, sir.

Mr. GUDE. You said that it is going to take us 5 years, if we are able to extract the money from Congress to get the pilot plant on line, check it out and see if utilizing the estuary water is a viable solution. You

also mentioned interconnections as a feasible solution to augment the water supply.

In light of our problems in getting dams on the line, even with getting one dam on the line, and the delay that we are going to have with the pilot plant, it would seem to me that the corps would have some time ago given a very strong priority to lateral transfer of water or interconnection, shifting the water around the metropolitan area if we came to a crisis situation.

RESERVOIRS

General McGARRY. I would like to explain. It does not bring water into the basin. What would be proposed would be intake structures on the Potomac. During periods of higher flow and drought could be pumped into the reservoir to give us capability to meet peak demands.

Until recently, that type of project would not have been a Federal undertaking. That kind of interconnection work is normally done as a non-Federal expense in other jurisdictions. It was the act that authorized NEWS and the Water Resources Development Act that we believe does allow for Federal funding of such a program.

You are absolutely right. We perhaps should have pursued it 3 or 4 years ago, 5 years ago, 10 years ago. We are looking at it actively now. By the same token, the jurisdictions in the region have identified it as a possible solution 3 or 4 times and nothing has happened.

Mr. GUDE. There is a possibility of transfer from the Sanitary Commission's reservoir on the Patuxent.

General McGARRY. Yes, sir.

Mr. GUDE. And also from reservoirs in Virginia?

General McGARRY. That would be the ultimate schemes of interconnection, to withdraw from the Potomac, fill back up those reservoirs to use during the day. They would have to be connected so the Washington metropolitan area, Washington aqueduct that has no storage capacity, could use them.

It is certainly a feasible solution.

Mr. GUDE. It strikes me this should really be a priority scheme. You don't anticipate the protest in the case of lateral transfer that you would in the case of the construction of dams.

General McGARRY. That is correct, sir. On all of these problems in the past, no matter what the report has been, instead of acting, the question has been raised well, did you look at this alternative and look we have gone to look at another set of alternatives.

I gather from both of you, Mr. Gude and Mr. Harris, that you feel frustration with that and I share it. It is time to stop studying and move to action. The vehicle I hope to use will be our Washington area study which I feel should be the absolute last study.

We don't need any more studies. It should be done as quickly as possible, put price tags on these various alternatives such as interconnection and get on with the show.

I do feel strongly that unless we have that estuary, pilot estuary plant, that can show whether that could be used as a source of water, the decisionmakers are going to wait until we have that information.

That is why in my opinion that is the priority project because it is almost impossible to shorten that 5-year period.

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Mr. GUDE. Well, in looking at the history, we can stand and look back. Dams just are not—impoundments are just not evidently viable as a way to travel. The interconnections, we should not have to study those 5 years. We can move ahead with recommendations right away, and I share your concern, as you know, about the pilot treatment plant.

We have got a little money in the House, and I think before it clears the Congress one way or the other we are going to get enough to keep the pilot plant on time so that we don't lose any time on that project.

That is all I have, Mr. Chairman.

Mr. HARRIS. I want you to move ahead to section 3. I am particularly interested in section 3.

General MCGARRY. The Washington metropolitan study?

Mr. HARRIS. Yes; section 3. By the way, $7.8 million is the estimated cost. Is that a true cost of the treatment or is that just something to get us started?

General MCGARRY. No, sir, that is the cost to build the plant with one hedge, inflation. I can only estimate the cost at today's prices.

Mr. HARRIS. I can't help thinking, Mr. Gude, $7.8 million could build a pilot plant for the use of estuaries. That is one-tenth of one B-1 bomber. If the military will forgive that, we will proceed on section 3.

General MCGARRY. I want to be sure which one you want, the NEWS study?

Mr. HARRIS. That is right.

NEWS STUDY

General MCGARRY. All right. The NEWS study is the study of the northeastern part of the U.S. water supply directed by Congress as a result of the drought in the sixties.

Early in the study they identified three metropolitan areas with serious water problems, Boston, New York, and Washington. They dropped a series of strategies for solving those problems for the three regions.

I will just be talking about Washington today. It is important to realize that the NEWS report was not a survey scope report and was never intended to result in a recommendation to Congress for the authorization of projects. This was only to develop strategy. Five of them depend on advance techniques and three of them are short term solutions using technologically proven projects.

We went out and in a series of public workshops with public leaders and regional planners, we attempted to identify the subjects and objectives that were important to the public. Then we assigned values to specific projects based on those assumptions and objectives and put this into a set of programs to meet the subjects and objectives.

We made three assumptions and they are important. First, any program developed for the region should meet the monthly demand, and the 7-day demand. Monthly demand is the requirement for water over a 30-day period, total requirement.

Seven-day demand is the same thing only for 7 days. We assumed that Bloomington would be on line by 1979. That assumption has already slipped 2 years. They assumed that droughts of less than 7

days would be met locally, through local action, severe restrictions, rationing, things of that nature.

There seems to be consensus that we can't afford the 1- through 6-day solution. Programs are designed to meet one or more of six objectives. Low risk, low cost flexibility, environmental impact, social and economic equity, and growth control.

I think it is important to realize that it is probably impossible to design a program that will meet all six of these objectives. For example, the lowest cost program both in investment, operation and in energy use would be a series of large reservoirs, but this probably would not meet the objective of limited environmental impact or social equity.

The strategies developed meet some or all of these objectives. Briefly, the programs involve projects that are shown on this chart. For early action, Verona Dam plus interconnections would be a solution. Verona Dam and severe emergency restrictions in the region would accomplish the same thing.

Or, a series of local impoundments and Goose Creek and Catoctin, which were recognized as alternatives, would accomplish the same thing. These are three strategies identified as short-term solutions. For the long term, there is a consensus that the eventual solution to Washington's problems should consider advance or unproven technologies as well as proven technologies.

The problem with that is the delay that seems to be concerning you. Many of the advanced techniques can't be used today because of unanswered questions. Proven techniques are upstream reservoirs, local impoundments with high-flow skimming, raw water connections and ground water.

The unproven technologies are the estuaries, waste water reuse through AWT, ground water. However, there are serious questions about the reliability of these sources. There are political restraints on using ground water from one region to supply another area.

These have to be resolved. Last, reuse of waste water by land treatment. We would pump it upstream, return it to the land and allow it to be purified as it flowed. Part of this question asked how these strategies interconnected and related to other ongoing programs. That is almost an endless question but some of the interrelations are a pilot treatment plant, for example.

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COG WATER QUALITY STUDY

We have to work closely with Maryland's regulatory program because the quality of the water in the Potomac depends on their program. The Council of Governments' 208 study, the water quality study, will have an impact on the quality of the water.

Virginia communities in the Washington region are interested in the Potomac as a source of supply and would be interested in the estuary plant as a source if it were a viable source. Verona Lake, we have to work with COG's water quality study because releases from Verona will have impacts on their study and as I said earlier Augusta County's water supply problems also.

On Bloomington Lake we are coordinated with COG on a water quality study because the release of the studies, the timing of the re-

lease will improve the quality of the water. We spoke of interconnections. A bicounty task force from Montgomery and Prince Georges County are looking at the possibility of proceeding with interconnections to solve their problem.

We will be coordinating with them. In implementing any of the strategies developed by NEWS, there are political constraints and I have identified four that are perhaps most significant. It seems that in any strategy we develop, there is opposition to a particular project. The opposition to Sixes Bridge is that example.

In that case it is strong enough that I recommend we abandon it. Almost inevitably, the local residents of any facility, near any facility have a tendency to object. These would have to be overcome.

REGIONAL MANAGEMENT

Second, if we implement any of these strategies, we will have problems of regional management, not necessarily reorganization of the governments but an example of this problem is the officials in Maryland told me it took them 3 years to get through their legislature and establish the necessary authorities and agreements to meet their commitments to pay us back for Bloomington. It was a low, slow process that almost failed several times along the way.

We face these problems with other solutions. A third problem that is perhaps unique to the Washington area is there seems to be a conflict between those who want to use waste water management or water supply management to control growth, the philosophy being if the water or the sewage treatment facilities are not there, we can thereby control growth.

They seem to be in conflict with those who manage our water resources to meet a reasonably projected demand. If we can't agree fairly soon on the population that we are going to serve, we will never get there. We have been chasing this population for a long time and this has to be resolved and resolved promptly because you can't have a sewage system or a water system without a basic decision on population growth.

FUNDING

The last political constraint they have identified would be funding and cost sharing. On all our projects, they have been slowed down by getting necessary funds for the capital investment. When we turn around and implement the laws on cost sharing, we may run into opposition in getting a commitment from a given community to share the cost. These problems can be solved but they tend to slow us down. We had two public meetings on the NEWS study, one in Maryland, one in Virginia, both in March.

At the Maryland meeting, I sensed approval of the approach. The opponents to Sixes Bridge came to the meeting and reemphasized their opposition. Several speakers spoke of the need for population control in the region both from water supply and waste water management.

I sensed a very strong feeling by the public that the water supply studies that we are doing should be fully coordinated with the waste water studies under 208 in this region. I guaranteed the public and I guarantee you that we will fully coordinate those.

At the meeting in Falls Church, Va., I came away with the impression that the opposition to any reservoir in Loudoun County dominated that meeting. There were 3 busloads of people from Loudoun County and 40 or 50 speakers stood up opposing any reservoirs in Loudoun County. I got the message.

As far as the Washington metropolitan area is concerned, it is finished. Any work that remains to be done will be done under the metropolitan study.

Mr. HARRIS. You say water supply control is a good birth control? [Laughter.]

POPULATION

Mr. HARRIS. How many people are we going to have in the region 20 years from now?

General MCGARRY. We tend to use the Council of Governments population projections.

Mr. HARRIS. Which ones?

General MCGARRY. When they finally finalize them for the 208 study. Unless we absolutely can't live with them, we have to use them. By 1980, in the water supply region, a population of 3.4 million. In 2020, 4.9 million.

Mr. HARRIS. What is the date on that estimate?

General MCGARRY. It is about a 1972 or a 1973 estimate. They are updating it now and it will take it up to 4½ or 5 million by 2020.

Mr. HARRIS. What will they do with the others?

General MCGARRY. People will be afraid they won't have water and they will move out.

STUDIES AND PLANS

Mr. HARRIS. Congress directed the corps to prepare plans to meet the long-range water needs in October of 1965. It is now stated that the interim report ended the NEWS program and contains no recommended course of action. The WMA future water needs study authorized in 1974 which may be completed in 1980, is now necessary to finish what the 1965 directive said should be done.

This seems to add up to 15 years to study and develop a plan. That is almost as long as the 19 years it took us to build Bloomington. For the benefit of the committee and the record, could you summarize why it took 10 years to produce this report and will take another 5 years to make specific recommendations?

General MCGARRY. I am not certain why it took so long for the NEWS report to get here, sir, and I would have to investigate it. I would imagine it had to do with the level of funding. If this is a $2 million study and you fund it at $200,000 a year, that is 10 years.

We have one that is being funded at that rate, not water supply. I address the Washington study. Part of that is the level of funding. It could be compressed to 2 years if funded at a higher level. But I don't believe that is necessary because as I have stated, one of the most important facets will be the outcome of the pilot estuary treatment plant.

The law that authorized the resources study says that we must include results of the testing of the pilot estuary treatment plant in our report. So it will be difficult to conduct it any faster.

It is, I agree wholeheartedly, sir, that it takes an inordinately long time to complete these studies. A lot depends on a sense of urgency.

Since 1960, flooding has been our problem. I gave a talk on the NEWS study the day after Eloise in Prince Georges County and I did not have a big audience. They thought I was out of my mind.

Mr. HARRIS. The NEWS report discusses the decision time on page 24. With every proposed project, you state that it is too late to make decisions to bring this project on line in time to acceptably lower the risk of 7-day shortages. I was referring to this before. Given the number of unknowns and the poor record we have for forecasting weather or populations, how are you so sure it is too late?

General MCGARRY. I would have to agree with you, sir. If we don't have a drought, we don't have a problem. There is no indication in anything I have read or studied that droughts are necessarily cyclical. We can't say we have not had a drought in 10 years, therefore one is coming.

We could go another 50 years without having one. I would feel it is almost too late or it is too late for anything to be done because I am very uncomfortable with knowledge of the fact that in the Washington metropolitan area we have about 1½ days supply of water.

There are no reservoirs at all in existence right now. If we have a drought that gets us way down, we have no capability of providing water. In my opinion it is too late. We should have built these things a long time ago. Decision time is upon us.

I am going to push the Washington metro study just as fast as it can be pushed. The only thing that will slow us down will be if it is not funded at the maximum level to get these.

Mr. HARRIS. With optimum funding, how soon could we have the study?

General MCGARRY. We are planning September of 1980 but I believe that depends upon the completion of the pilot estuary treatment plant. That is 2 years of testing on the pilot plant. That is the controlling factor, sir.

WATER SHORTAGE

Mr. HARRIS. Well, given the time it has taken to build Bloomington, what solutions do you foresee that could be accomplished in time to acceptably lower the risk of a 7-day shortage?

General MCGARRY. You mean short-term solutions that we could get on with. I don't know of anyway to get any of them on line very fast. Bloomington, if we can get funding to keep that going at its optimum rate, we can have it on line by 1980.

That is not only in this budget but the following budgets will have to be supported. The emergency pumping station will provide us quite a bit of capability and if we are fortunate and don't have a bad drought. Any other projects, based on my experience, if they are going to be accomplished at the Federal level just don't get accomplished in a year or two.

INTERCONNECTION SYSTEMS

The interconnections could be done faster if the non-Federal agencies responsible decided to proceed. That is an option open to them.

Mr. HARRIS. You are really saying that the interconnection is one of the solutions that would give us—that could be done fairly quickly?

General MCGARRY. Yes, sir, fairly quickly if done by non-Federal interests. I am afraid that unless——

Mr. HARRIS. I understood that part of it. You really feel that it is incumbent upon the jurisdictions to move ahead on this rather than to wait for the Federal Government to do it for them. Is that a fair statement?

General McGARRY. No, sir. I don't know enough about their financial status or capability, whether they could afford this type of investment to make such a recommendation. In many other areas such as flood control, I know there are several jurisdictions who have decided not to wait for the long, slow Federal process and are moving ahead on a couple of them, the planners and the leadership wanted to do that and when they got to the budget appropriation time, they ran into the same problem we did. These are expensive projects.

Mr. GUDE. Do you have any projections on what an interconnecting system would cost?

General McGARRY. We have that in one of the reports. I don't have it at my fingertips.

Mr. GUDE. You have identified two areas of fairly immediate assistance in contending with both the long-range water shortages and short-range water shortages, interconnections and conservation.

Where does the leadership responsibility lie for these two areas? Do you want to go back to the cost there before we get into this?

General McGARRY. Yes, sir. On the interconnections, say, for the Patuxent Reservoir project, it would provide a capability of about 260 million gallons per day. We are talking $114 million to interconnect. For the Occoquan at 20 million gallons a day, we are talking about $48 million. These are expensive projects.

Mr. GUDE. If these interconnections were made, would they not be of benefit to the Federal Government in that they would augment the supply of water?

General McGARRY. Yes, sir. I am sure they would turn around and ask us to pay them back probably through water usage rates. In the long term, we would wind up passing it on to the customer. It is the initial capital investment. I believe under the current law, the Federal Government could participate in the construction of such a system under the Water Resources Act where we would pay for the initial investment and then ask for reimbursement over a 50-year period from the communities.

But we have to go through the somewhat slow Federal authorization and appropriation process.

Mr. GUDE. Do you think there is a willingness among the jurisdictions involved to go into this? You have the Sanitary Commission and the Virginia Water Authorities.

General McGARRY. To go into a project such as this?

Mr. GUDE. Yes.

General McGARRY. I am not certain, sir. I believe they would prefer to support the Washington metropolitan study that we have underway and wait for the results of the estuary plant as a solution rather than proceeding now and take the risk.

ONE PLAN

Mr. GUDE. You mentioned the Council of Governments had an emergency water plan. Do you think this would be reliable and adequate to meet the demands if we had a drought situation here?

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General McGARRY. The plan covers all situations. As the availability of water goes down, more stringent restrictions are initiated to the point where there is absolute prohibition of using water for outside sources such as watering lawns or car washing. Then if that is not sufficient, we are down to the point where there isn't enough in the river to meet the needs, the plan won't help that.

At that point, we have a proposal to allocate the flows of the Potomac, shortages, really, to the various people that use the water supply. That allocation formula is on its way toward getting approved.

LEGISLATION REQUIRED

It has not been approved. We are in agreement on the formula but we need an act of Congress to authorize the corps to enter into such an agreement. We need final approval by Maryland.

Mr. GUDE. As you know, we have the legislation introduced. My understanding was we passed the legislation and we still would not have the agreement. We do have an agreement?

General McGARRY. We have a formula that has been worked out and agreed to between all the jurisdictions, Washington Aqueduct, myself, the Washington Suburban Sanitary Commission and others.

The last step we need in that agreement as I see it right now is approval of the State of Maryland which feels that it has a role to play in the agreement. I checked yesterday and we have not heard either yes or no from Maryland on their thoughts.

If we get agreement from them, we could sign it the day the act is passed.

Mr. GUDE. All aspects of the agreement, not only the ratios but all aspects of the agreement are ready and waiting to be signed off except for the State of Maryland?

General McGARRY. Yes, sir. Hopefully the bill will be approved by Congress and not modified. If the bill does not read the way it is, I can't predict what the bill would say. We are concerned, the corps in its role as a water supplier, we are concerned that we are the last intake downstream.

We have a need to protect our customers from having the water upstream from us withdrawn and we can't have it. On a technical level we never had any argument on the allocation formula. We resolved that almost 2 years ago. The argument since then has been jurisdictional argument whether the State of Maryland has jurisdiction over that water and the right to allocate it.

As you know, Maryland owns the Potomac. Their border goes to the far shore of the river and they feel they do have the right to allocate the water. The Federal Government has not accepted that position.

In my opinion this act authorizes the Federal Government, namely, the corps, to enter into an agreement to share it during periods of low flow.

Mr. GUDE. So, as long as we agree that Maryland owns the river, we can divide up its waters?

General McGARRY. I don't think the act is worded that way. We intended to word it so it does not decide whether or not they own the water because I believe the Virginia interests among others would object to an act that said for ever and ever Maryland owned and could allocate that water.

Mr. GUDE. All through the various plans and studies that have been made in regard to water supplies from the river, a theme that emerges more and more is that water conservation plans could significantly reduce the water demands per capita. What do you visualize the Corps of Engineers' role is in seeing that these conservation plans are instituted?

What is the role of the Council of Governments? What is the role of local jurisdictions? Should someone have the authority to insist that there be water conservation? If the corps is going to go through these long, painful exercises to supply more water and we are going to go through these studies, can we sit by and say, well, the water is being supplied but every jurisdiction can just use it as it sees fit?

If it is wasteful in its use of water, so be it. That has to go into the per capita demand for that jurisdiction? Where is the buck going to stop on this?

WATER CONSERVATION [illegible]

General MCGARRY. Probably with the Congress, sir. I had planned to address water control techniques later on but I can do it just as well right now.

Mr. HARRIS. You really were covering that in section 5, were you not?

General MCGARRY. Yes, sir. We can flip over and do it now.

Mr. HARRIS. All right, if you will.

General MCGARRY. You did ask me to address the concept of controlling the demand for water and the corps' role in it. There are four techniques that are available for controlling demand, land use, pricing, plumbing codes and educational controls.

First a comment about land use. As I am sure you are aware, there is no Federal law and no Federal program for land use planning. It is a non-Federal responsibility and generally not even a State, a local jurisdiction responsibility. So we don't hve a role to make recommendations in that area.

It may be too late for land use planning to be a solution to the Washington metropolitan water supply problem because we are already in a situation where the demand exceeds the recorded low flow and even the most conservative estimates of population still indicate the population is going to grow and by the year 2020, we will have 30-day deficits in 1980 to 1990. It is a non-Federal activity and in my opinion it is probably too late for the Washington area.

Rational, reasonable pricing controls will also reduce the demand for water. In the NEWS study, we have identified the impact of these and in part of our Washington metropolitan study, we will report to the Congress when we recommend anything we feel should be done or what is being done in the area of price controls.

I think a couple of thoughts should be borne in mind on price controls. First, it does not appear to me that we are going to get a very significant reduction as a result of price controls.

We can get a reduction, but it will not be enough. Some studies indicate you can get an 8-percent to 9-percent reduction annually through the initiation of price controls, but a 2½ to 3 percent on demand during the peak period.

This will not solve the problem in the Washington metropolitan area. We need more than that. But it certainly has to be considered and we will incorporate it in our study.

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Another thing that is often overlooked is to institute a system of price controls takes a capital investment and an operating investment. All those meters cost money to install and hook up and it takes an agency of some sort to read them and establish price systems.

In my experience in military housing in Europe during the 1960's when we had a serious water shortage problem, we found that we could not afford this type of control. The investment was too much. I am not sure that will be true today, but it should be considered.

Plumbing codes can also reduce the demand for water, changes in public codes specifying better systems. Programs such as this are already underway in the Washington metropolitan area and in our projections of demand, we are predicting that the demand will be reduced by 40 million gallons to 60 million gallons per day by the year 2020 through the installation of water-saving devices and changes to the codes.

That is an ongoing system that will reduce the demand.

Educational programs to urge people not to waste water, again, probably is a local responsibility, but it has proven effective. So, the demand can be reduced. I do not believe that land use restrictions are applicable to the Washington metropolitan area at the present time because we are already past that point.

PRICE CONTROLS

We will include our thoughts on price controls, plumbing codes, educational programs in our recommendation for any project as a part of the demand. The eventual decisionmakers will be the Congress when they agree to either fund or not fund projects.

The concept in the United States up until now has been to provide the water needed for our way of life that we tend to accept and enjoy and that includes watering of lawns and watering of parks in the Nation's capital, swimming and other water recreational sports.

To curtail that might mean a similar change in our way of life. But basically, my thoughts on controlling demand is it is a non-Federal responsibility at the present time. The decision process would be whether the Congress would say no, we are not going to fund these projects and provide that amount of water.

You will have to reduce your need.

Mr. GUDE. To that point, if the corps is supplying water to several jurisdictions in the area and the jurisdictions vary in the extent to which they implement conservation techniques, is it not appropriate that the corps take leadership in charging more for water that goes to the wasteful jurisdictions?

You say, well, that is not actually going to provide a significant savings in money, but the other jurisdictions are being robbed of a share to the extent that they are trying to conserve.

General MCGARRY. Well, are you speaking of during an emergency situation, sir, when the flow is down or today when there is adequate flow?

Mr. GUDE. Well, when there is adequate flow—actually when you are talking about supplying water, it costs money. Saving water is saving energy.

General MCGARRY. Yes, sir.

Mr. GUNN. And money.

General MCGARRY. We charge our customers enough to pay our operating expenses and to amortize the investment in the plant. We just recently have increased the rates for water as a result of increased operating costs. But we don't charge prices that would be aimed at reducing the consumption of water.

At the present time there would be no need for that. During periods of low flow, the agency that will restrict the use of water is the council of governments, and I have reviewed their plan.

I think they have a good plan as the crisis develops to implement restrictions. To my knowledge, the jurisdictions have all passed the necessary laws to be able to enforce those restrictions.

During that period we will all be using less water.

Mr. GUNN. Well, you are not suggesting that your role as a water supplying agency is to be blindfolded to the extent that the various jurisdictions you are supplying are initiating water conservation techniques.

You think that is out of your hands all together? You are merely there to supply water summer and winter and it is up to the jurisdictions whether they are wasting water or conserving water?

General MCGARRY. At the present time, yes, sir, it is the corps' decision whether he wants to buy the water at the price it is charged. There is no attempt to my knowledge in the Washington Metropolitan area to reduce the consumption of water at the present time.

The philosophy that exists today is to provide enough for the demand. We have the capacity to do so. We have built the plants in the past to meet that requirement. If, as a result of the study we are going to do to finish up here, it is the time to change that philosophy and not provide enough capacity, that will be dealt with then.

CONSERVATION SYSTEMS

Mr. GUNN. There are two water conservation programs we are talking about. One of them is an emergency program which is going to occur during a drought when it is necessary to cut off the sprinklers and stop washing cars and that type of thing.

Then there are the day-to-day conservation systems which can significantly reduce water consumption. It seems to me, in light of the——

General MCGARRY. Well, I would question the "significantly reduce consumption", sir.

As I have stated, the jurisdictions to my knowledge have passed or are passing plumbing codes changes so new construction won't use as much water as in the past. To go back in all the old homes and change it probably will never be done.

I know of no—we have no evidence of waste of water at the present time. There is an adequate water supply for watering lawns and we provide water for watering lawns. There is adequate water for washing cars. We provide water for washing cars.

Mr. GUNN. The Washington Suburban Sanitary Commission in the Cabin John program initiated a program of public education and they achieved consumption by 20 percent. That is really significant. That is one-fifth. Don't you think—I mean, this evidently was not done with

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great pain and anguish to the citizenry. I think they are very cooperative. If we can do that in the Cabin John watershed, what can we do over the whole metropolitan area?

General McGARRY. I don't know why they decided to reduce consumption. I suspect they had a lot of problems that they didn't have the capacity to meet. It is true that the consumption of water can be reduced by 10 percent with negligible effects, up to 30 percent on a short term basis without seriously impairing our way of life.

But at the present time when there is adequate water, we are not causing that kind otf conservation. What happens, sir, is you restrict lawn watering. You restrict car washing.

You restrict filling the swimming pools and other unnecessary uses of water. Yes, the public can do that but the need does not exist today.

Mr. GUDE. When you say we have an adequate supply of water, I get the feeling we are saying that that means the corps is ready and willing to supply water as each jurisdiction demands it as long as it is coming down the river or you can get it out of the reservoir.

General McGARRY. That is correct, sir. I would ask what is the suggestion? Should we start now and forever prohibit lawn watering?

Mr. GUDE. The Cabin John plan that I spoke of where there was a 20 percent savings, that was a program initiated to see what could be done with citizen participation in conserving water, leaking faucets, flush tanks devices, not drying up the jurisdiction or causing great hardship with the citizenry.

It was merely conserving water on a day to day basis. I agree that in the past this country has been very fortunate with a bountiful supply of water. But we are getting to the point where, just like energy, we have got to just be a little sensible.

I think that is all that was involved in this Cabin John project. It seems to me we are talking millions of dollars for transfer operations and impoundments and water conservation—these small and mundane devices are things that the corps might look at and carry a big stick on.

General McGARRY. That is very true, sir, but first I doubt that they achieved a 20 percent reduction without drastically reducing the outside use of water. For example, at Washington aqueduct the difference between the maximum demand day in the summer and the minimum demand day in the winter when there is virtually no outside use is about 25 percent.

To achieve a 20 percent reduction, in the case of Cabin John, the problem there was to reduce the use of water because of a restriction in the capacity of the sewage treatment plant to handle it. Such a scheme is possible and if that is the desire and the demand in the region, there is a way to implement that. That is not to provide the capacity and it won't be available and during periods of low flow, you will go into emergency type restrictions.

But at the present time, we are not aware of any major waste of water in the region. We know that toilets, for instance, could use less water, that faucets perhaps leak. But there is no Federal program to go out and correct that.

Mr. HARRIS. Would the gentleman yield on that?

Mr. GUDE. Yes.

Mr. HARRIS. The point seems to be getting confused between what Mr. Gude is asking and the response he is getting. We are not talking about emergency actions to reduce water use in a critical period.

We are talking about basic water conservation measures which can be used to reduce the cost to the consumer in normal periods and reduce the cost to Government's supplying waste water treatment capacity also, hydraulics being one of the most sensitive areas, as far as cost is concerned.

Anybody who does not think stopping a leaky faucet does not affect cost ought to see my water bill when I have a leaky faucet. If in fact we have geared our apparatus to use a certain quantity of water, when the emergency comes, it is kind of hard to make that change.

What I think Mr. Gude is talking about is getting programs into place that can have immediate effect as far as not wasting water is concerned, which can have also a beneficial effect when a critical period comes as far as the use of water is concerned.

One wonders if the corps, is kind of the czar of water in the metropolitan area, does not have the responsibility to urge conservation measures as we go into the future.

Mr. GUDE. Let me go into the savings I am talking about, General McGarry. I am not talking about emergency type restrictions. It has been estimated in one study that potential savings by leakage control in a system would depend to a large extent on how vigorously losses were pursued.

There is an estimate that 17 percent of municipal water goes to losses. I am not speaking of saving all 17 percent because obviously you can't go through a system and get every one of them. Let's say that one-third of the leakages in the system were taken care of. There we are talking about a five percent saving. I have a Library of Congress study that estimates a total percentage savings in the system in the neighborhood of 30 percent if proper steps were taken. 5 percent for leakage control which I just addressed, incentive pricing, 10 percent, additional charges 5 percent, water saving devices 5 percent and then they have 5 percent for drought contingency plans.

That is only 5 percent out of the whole 30 percent. Let's say we drop the drought contingency plans. If a jurisdiction implemented a conservation, an on-going conservation plan over a period of several years, they could come into the neighborhood of a 20 percent savings without any great inconvenience or hardship to the people.

When we are talking about water, as I said, we are talking about energy. It takes energy to get that water to the faucet. In this day, it is not only a question of saving water but a question of the national energy program.

General MCGARRY. Well, I would question whether the corps is the czar over that type of activity. We are certainly not because that gets into local—specifically local problems. Also many of the leaks that you talked about are in the private owner's home. An educational program might accomplish that sort of saving if they chose to make that investment.

Part of that saving, I believe you said, comes from pricing which would, as I said, cause probably an 8 to 10 percent reduction in demand on a yearly average. It is a possibility. Up until now it has not been the philosophy of this country to use less water.

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We have tended to provide all that is available. Whether we will continue to do that or not remains to be seen. We don't have—the corps—authority to compel communities to dig up and repair their water lines. That could be expensive. Under the present scheme, we will continue to provide them water that they need.

Demands can be reduced. Don't misunderstand me. Demands can be reduced and if they are reduced then the need for additional facilities does not exist. It would be reduced just as your report said, sir, through pricing, plumbing code changes. I would expect it would be mainly implemented through new building construction.

We are already counting on a 40 million to 50 million gallon per day reduction from that. We have no authority to force that type of reduction at the present time.

Mr. GUDE. But you are selling water to jurisdictions in the Washington area?

General McGARRY. Yes, sir.

Mr. GUDE. But you don't feel it is your obligation to, in light of the fact that we do have a national energy problem, we do have a regional water problem, to look at the pricing structure of the water you sell on a per capita basis to these jurisdictions and structure your pricing so if the jurisdictions did not implement conservation techniques which we know will work—I don't believe there is any mystery about these techniques—that it is only fair that those jurisdictions that are wasteful pay more for the additional water they use over those that are following conservation techniques.

General McGARRY. Of course they are paying somewhat more because they are paying per gallon.

Mr. GUDE. But it is at a flat rate?

General McGARRY. Yes, sir. The distribution and the charge to the customer is the responsibility of either the Washington or the Virginia communities. We sell it to them at a flat rate for their distribution purposes.

If they wanted to adjust prices to discourage the use of the water, it is certainly a possibility. But I don't believe personally the answers are as simple as they sound. Generally it is the people who can least afford it who wind up paying for it when you increase the price of the water.

Also there is no guaranty that the reductions will be anywhere near what has been predicted. Look at gasoline. The price has doubled but people are still driving just as much, maybe more.

Mr. GUDE. An example is when the father gives the son a credit card and he just goes out and uses it.

General McGARRY. That is not a good analogy, sir. We have charged the customers for the cost to produce it and for the cost to build the facility. It is a moneymaking proposition. Generally water supply is a profitmaking operation.

Mr. HARRIS. I think this makes an important point. I have seen it at both ends of the line. I think it is true that once we get our installations in, once we get our pipes in the ground, that perhaps from your standpoint and certainly from the local water authority's standpoint, the more water they push through the lines the better off they are financially and with very little increased cost the additional gallons don't cost that much more.

We see those kinds of economic pressures on the local water authority and perhaps on the wholesale producer to maximize the use of water. At the same time we are looking down the road a little bit and saying what happens in the long term perspective if we don't have enough water.

I think there is no question that it revolves around the question of who is worried about conserving water, if anybody is. I hope you are not telling us now that the corps is not worried about conserving water.

General McGARRY. We will present that as an alternative when we recommend a plan of action for the community, an alternative we are actively considering, the possibility of conservation. One of the recommendations of the NEWS group would be that you could meet the water demand by Verona Dam and emergency restrictions, nothing more.

Another point I would make is that any of the projects that would be built or would be recommended will eventually be paid for by the consumer. It is not a giveaway program. He will pay back for it. The Congress, when we recommend it, will determine whether the investment—whether we should do that much or not.

We are going to look at water conservation. But in the past we have felt that the philosophy nationwide has been, provide all the water people reasonably need, not for waste. I know there are strong feelings that we should stop washing cars, we should not water lawns, and we should not wash our clothes as often as we do, one of the big customers of water.

Personally I enjoy that style of life and think we should look at that alternative, providing what we need, as well as conserving it.

Mr. GUDE. You say you feel that water conservation should just be an alternative, say to the various jurisdictions, well, you can use as much water as you want if that is the way you feel about it.

We will stand ready to supply as much water as you need. If you want to conserve, that is an alternative to look at.

General McGARRY. The only thing I would argue with that is that we stand ready to provide it. We are saying—what I want to say is that if you want all the water you need, it will take an initial investment of such. The environmental impact will be such. The alternative you have to choose from is not providing it.

May I ask, sir, are you suggesting that during periods of adequate flow in the Potomac that we should not use that water and provide all that people need or are willing to pay for?

Normally, the Potomac has something like 3 billion gallons per day. 100 times what we need going by.

WATER LEAKAGE CONTROL

Mr. GUDE. What I am saying is let's just take leakage control. The estimates are that 17 percent of the water that goes through a system is leaked out, is lost, and that with proper measures that one-third of this—and that is certainly a conservative figure, even less—one-third of this could be saved.

I think this is a reasonable conservation measure. That would mean that if we instituted control of leakage over the entire metropolitan

area we would need 5 percent less water. We are not just talking about the water flowing down the river.

It is not going to require more pipes, it is not going to require more impoundments and more pumping. It is a savings in energy as well as a savings in water. I think this is a reasonable demand which the corps should make.

I don't think it would be unreasonable to tell the jurisdiction if you don't reduce your consumption by 5 percent, then we are going to escalate the cost of that additional amount of water because you are wasting it. It is going into the ground.

I think we all recognize in the past we have had a policy of unlimited energy and unlimited water, all the petroleum, all the coal and all the water we want. But I think we are entering a new era. I think water conservation is looked on as, well, a pious thing that the ladies can talk about at their women's club, but it really isn't meaningful. I think it is very meaningful.

General McGARRY. The correction of leaks that you are talking about, sir, is not as simple a problem as saying just go out and do it. I doubt there is a utility manager who would not start tomorrow in correcting the leaks if somebody would give him the money.

In our military installations, we know that there are pipes that leak. In the past we have never been able to get money to dig them up and repair them. It is an expensive proposition. When we go into households, that requires a private investment to correct these leaks.

If directed by the Congress to increase the cost to reduce 5 percent, it certainly could be done. We have no intention of doing it right now.

Generally that part of an operating budget for a municipality, when they come in and talk to you, they will tell you that is the toughest part to get approved.

Mr. GUDE. I am not suggesting that the corps go around and send a soldier to everybody's house to see whether they corrected the leaks. All you have to do is raise the price of water when it goes above a per capita consumption and leave it up to the jurisdictions whether they want to correct the leaks.

If they don't want to, let them pay more for water, But it is an expensive commodity. It costs us a lot to get it here and it costs us energy which is a commodity that we are all concerned about.

It says in the MWA study that one of the areas to be looked at is the effect of water pricing and use restrictions on future demand.

General McGARRY. Yes, sir.

Mr. GUDE. I know you all don't want to get involved in local government but you are the wholesaler of water to local government. It seems to me we all should be looking at conservation for the local jurisdiction up to the Federal level.

Thank you, Mr. Chairman.

Mr. HARRIS. Thank you, Mr. Gude.

WATER SUPPLY

Environmentally speaking, does the Potomac River basin have a maximum that the population can support?

General McGARRY. It probably does, sir. In the projections that we are using, it is probably pushing the limit. That is a personal opinion

Mr. HARRIS. So much of our estimating here seems to be guesswork and I just wondered if the corps has worked out a model, a computer model with regard to water supply for this area that would give us more definitive answers, recognizing the variables that we have. So many of the problems that we deal with nationally have those kinds of variables in them, too.

The answer usually is that we come up with a model and see what comes out under different assumptions. Has that been done with regard to water supply?

General MCGARRY. Yes, sir. We have done some fairly extensive modeling on the water supply-water demand problem with the region. In previous studies of the water supply, we took the greatest demand day ever that occurred or that we projected could occur and looked at the very worst supply day and said that is the shortage.

When we prepared the NEWS report, we found that that is not realistic and tends to grossly overestimate the shortage. So using computer modeling techniques, we have refined the demand down to smaller regions and looked at the capability of the regional source to supply it and we have modified the supply down to a monthly basis, a week within that month and a day within that week and addressed the problem on a much closer basis and significantly reduced the projected shortage.

At one time we said that with Verona and Sixes Bridge and Bloomington on line, we would have a shortage on the order of 200 million gallons per day by 1980. That is no longer true at all. We say with Bloomington on line and interconnections you can meet the demand.

That is the result of defining demand more closely. We have determined that it is only in the summer that you have to worry about the problem. In the winter time there is more than adequate water.

We analyzed it on a month-by-month basis. That is why in the news report and in our report, we will put strong emphasis on peaking-type projects and that is where pricing control could have a more significant impact than it would on the long-term solution.

I think the week points and the difficult point in any of these studies are the population projections. As I said earlier we have been chasing that for a number of years. Until we can agree on what population to plan for, we will never get there. The same problem faces those planning waste water management.

Basically you need about 140 gallons per person per day. If you can determine how many people, then you can make a projection.

Mr. HARRIS. That depends on how much infiltration you get, General. If you're worried about water getting into the sewer line, you use television cameras to find out where the water comes in.

But you don't send any television cameras down the lines to see where the water leaks are.

General MCGARRY. Unfortunately they are too small.

Mr. HARRIS. Oh, we can make real little cameras now. Fairfax County has decided to construct a water intake on the Potomac. What is the process that a local jurisdiction goes through to determine whether or not they can go ahead and start taking water off?

What is the process we go through regionally here to determine whether or not Fairfax County should put another water intake in or

if somebody upstream further decides to put one in, what is the process?

PERMITS TO WITHDRAW WATER

General McGARRY. A long, slow, torturous process. They will need a permit from the corps to build the structure in the Potomac. They will also need a permit from Maryland in Maryland's viewpoint—I am not sure Virginia agrees.

When they apply to the corps for the permit, we will have to write a full environmental impact statement and consider the impact on the total region. We will deal with all questions that have been raised today, the question of whether we should draw more water from the Potomac when we know there is not enough when there is no flow. My district will have to process the permit to include an environmental impact statement.

There will be public hearings and then a final decision.

Mr. HARRIS. The corps does have the responsibility and the authority with respect to any additional water taken out of the Potomac?

General McGARRY. The responsibility is in issuing a permit with regard to any construction. We are required to consider the total public interest and we look at what is attached to that construction and what is the need for it.

We have done similar ones, Jellystone Recreational Area, where it was a simple structure but we looked at the total impact.

Mr. HARRIS. Does the Fairfax structure have a permit?

General McGARRY. No, sir. I was not aware until this morning that they had made a decision. Two years ago we wrote them a letter and we reminded them that they would need a permit from the corps. They are well aware of that.

I would be reluctant to act on such a permit until we saw a regional solution to the water problem facing the region. It is questionable whether it makes sense to aggravate the situation until we see the solution.

Mr. HARRIS. I want to be sure you understood what you just said there because it is liable to be of interest to Fairfax County. You said you would be reluctant to act on the application to such a permit until a regional solution was determined and your study is not going to be finished until 1980, is that right, sir?

General McGARRY. That is correct, sir.

Mr. HARRIS. We have had General McGarry in the hot seat for 2½ hours and I compliment you for your patience and your composure and—we did not cover all the points.

General McGARRY. We covered just about every point I intended to make.

Mr. HARRIS. Mr. Gude has some more questions.

Mr. GUDE. General, could you supply us with the most recent estimated leakage or unaccounted for water in the area jurisdictions that you all supply?

General McGARRY. I think you mean the Washington aqueduct and it will be their figures and not ours that we will provide.

Mr. GUDE. I understand. I would like, in summary, if you could tell us what immediately might—what you think is most immediate? You have already said that the pilot plant has the highest priority in your

opinion. I wondered of there are any other items? Of course we are going to try to get full funding for Bloomington and we are working on that.

Are there any other areas we could direct our attention to besides what you have given in your testimony? Do you feel the corps needs any new legislative authority in its role or is this something that is going to have to evolve from the study, the MWA study?

SUMMATION OF PROBLEMS

General McGARRY. I will address them one at a time, sir. We don't need anything in addition to what you have already mentioned at the present time. The Washington Metro study which to me is the vehicle that will give a specific recommendation on this problem for action has been fully funded in the 1977 budget and we are going to start proceeding rapidly on it.

The other point I would like to make is that I guarantee you and all others concerned with this problem that we will absolutely and positively closely coordinate our work with the Council of Governments' waste water study. It is essential that those two studies be coordinated.

For the first time we are treating both problems on a regional basis. You have created a superior agency for both problems. We have extremely good relationships with them and it will continue. I guarantee you it will be a coordinated effort when we finish.

They bring all the jurisdictions in, we will.

Beyond that, any additional legislation that the corps would need, many of the problems that I sense you are concerned with, water wastage in the jurisdiction, perhaps land use, in my opinion are not very good programs for a brigadier general in the Army to impose on the public.

Those are problems that are perhaps better handled on a regional basis where they are closer in touch with the problems. I would not recommend any legislation to get us into that type of effort. We have the tools that you have provided us and it will take longer than you and I would like if it is funded, I guarantee we will push it forward.

When it is all over, we will not recommend another study. We will recommend a specific program of action that will either solve the problem or the community can say we will live with our situation.

Mr. GUDE. Well, in reference to water conservation, I certainly was not trying to imply that the corps should become the water conservation czar. But I think you presently have the tools with which you could provide the leadership and direction to the jurisdictions to get into water conservation.

Thank you, Mr. Chairman.

Mr. HARRIS. Thank you, Mr. Gude. I want to thank you for bringing this testimony before us. These hearings are going to continue in some depth on the water supply and the whole water pollution problem.

Our next meeting will be June 10. We do have, I think, a number of additional questions, General, that we would like to submit to you that you may want to respond to in writing.

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I frankly would appreciate it if the corps could arrange to have some representative here during the hearings as we cover other topics.

[The documents referred to by General McGarry follow:]

I. HISTORY OF THE CORPS OF ENGINEERS' INVOLVEMENT IN WATER RESOURCES PLANNING FOR THE POTOMAC RIVER BASIN

INTRODUCTION

The Potomac River flows through a land filled with the names of many legendary places and events—Harpers Ferry, Gettysburg, the C and O Canal, Mount Vernon, and the Nation's capital, to mention only a few. The River has carried people's commerce, furnished them with food to eat, and supplied them with water to drink. As society has progressed since the time of the early settlers, more and more people have come to depend on the River, both using and abusing its abundant resources.

Since the middle of the nineteenth century, the Corps of Engineers has provided treated water to the District of Columbia and surrounding areas by means of the Washington Aqueduct Division. Because of its experience in other aspects of water resource planning, the Corps of Engineers has been working throughout the oPtomac Basin for many years; planning for such a diverse geographic area including the District of Columbia and parts of four states (Maryland, Virginia, West Virginia, and Pennsylvania).

The history of water resources development in the Basin includes many Congressional authorizations for individual studies, projects, and planning reports, dating from the 1900's through the present.

Early Reports and Authorities

POTOMAC RIVER BASIN STUDY

Prior to the 1950's, early reports concentrated primarily on the problems of navigation, flood control, and hydropower. However, against the background of rapid growth following World War II, and the ensuing technological, economic, social, and political changes of that period, there was an increasing awareness throughout the United States of the problem of water management to support this growth.

In July 1955, Congress authorized a study of the North Branch Potomac River for the purposes of flood control, low flow augmentation, and water quality control. (The Bloomington Lake project was subsequently authorized in 1962 as a result of this planning study.)

Later, in January 1956, a Congressional resolution was passed requesting the Corps of Engineers to review the earlier reports on the Potomac River with a view "to preparation of a comprehensive plan for control of floods and the development and conservation of the water and related resources of the basin, with emphasis on present and future needs for water supply and pollution abatement." (Resolution, Committee on Public Works, United States Senate, adopted 26 January 1956). This resolution and several other outstanding authorities for water resource projects in the Potomac Basin, including the North Branch Study, provided the basis for the comprehensive Potomac River Basin Study which was initiated later in 1956.

A subsequent Senate resolution in 1960 placed additional emphasis on water supply planning by directing the Corps of Engineers to review the earlier reports ". . . with a view to preparation of a plan for flood control, recreation, and development and conservation of *municipal and industrial water supply* and pollution abatement." (Resolution, Committee on Public Works, United States Senate, adopted 6 July 1960, 27 April 1960).

To insure that the Potomac River Basin Study approached the water resource problems of the Basin in a comprehensive manner, the combined efforts of specialists in many Federal agencies were used. Major contributions were made by the Department of Agriculture; the Department of Health, Education and Welfare; the Department of the Interior including the Fish and Wildlife Service, the National Park Service, and the Bureau of Mines; the Department of Commerce, and the Federal Power Commission. Additionally, an Advisory Group was organized to coordinate and review matters of mutual interest to affected agencies. This Advisory Group for the Potomac River Basin consisted of officials

adopted authorities

representation from each of the following jurisdictions and agencies: Corps of Engineers, Commonwealth of Virginia, Commonwealth of Pennsylvania, State of Maryland, State of West Virginia, District of Columbia, National Capital Regional Planning Council, and the Interstate Commission on the Potomac River Basin.

Based on the authorizing resolutions and preliminary investigations within the Potomac Basin, four major water resource needs and problems were apparent. Water supply deficits, both for municipal and rural areas, were projected to occur with increasing frequency due to the unregulated nature of the Basin. The Metropolitan Washington Area (MWA) was identified as the region with the most pressing water supply problem because of its rapid growth, and more importantly, because of its projected development. The other three major water resource needs in the Basin were identified as water quality control, flood control, and recreation. Consequently, planning in the Potomac Basin necessarily involves a multi-objective approach to developing the existing water resources in an efficient and acceptable manner.

In the conduct of the Potomac River Basin Study, investigations of immediate problems and potential needs, along with possible solutions, were made in all drainage areas of the Potomac River Basin. Several possible solutions were considered for each of the four major needs. All of the possible solutions were analyzed and compared to select those which best fulfilled the requirements. The variety of solutions studied for the four functional needs were as follows:

For flood control.—Flood storage; local protection; and flood plain management.

For recreation.—Development of existing areas; single purpose recreation developments; and exploitation of developments required essentially for other purposes.

For water supply.—Curtailment of use; groundwater development; surface water development; diversion from other basins; reclamation of waste waters; desalination of saline or brackish water; and weather modification.

For water quality control.—Primary treatment; secondary treatment; tertiary and special treatment; lagooning; dilution; distillation; and diversions to different receiving body.

Map reconnaissance studies and field inventories were used to establish a general picture of the location and geographical distribution of the reservoir site capabilities of the Basin. In total, 200 major and 2500 headwater reservoir sites were studied. Additional field investigations, development of more detailed design, cost, yield and storage data, and successive steps of refinement of this data reduced the number of sites to 26 major, and approximately 800 headwater reservoirs.

After consideration of these individual solutions to specific needs, formulation of multi-purpose basin-wide plans was initiated. Formulation of alternatives was guided by the following general criteria:

Maximum practicable degree of waste treatment;
Reservoir storage for flow regulation;
Reservoir storage for flood control;
Local flood control measures where economically feasible;
Maximum economic development of recreation potential for project lands and waters through multiple use and through provision of specific recreation facilities;
Continuation and expansion of current land management and conservation programs; and
Prosecution of programs for controlling and regulating the use and development of flood plains where appropriate.

Alternative plans for specific areas (such as the North Branch above Cumberland, and water supply for the MWA) and four preliminary basin-wide plans were developed from the final group of projects. This process of plan formulation was performed through the combined efforts of the participating agencies. The four basin-wide plans were then analyzed at a survey scope level of detail with one of the plans eventually being eliminated because of unacceptable geologic conditions at several of the major reservoir sites. The final three basin-wide plans were labeled as: (1) the Main Stem and Upper Basin Plan; (2) the Major Tributary Plan; and (3) the Upper Basin Plan.

From the review of the basin-wide plans by cooperating agencies and a series of public meetings, a plan was selected for recommendation in the District's report on the Potomac River Basin Study published in February 1963. The in-

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STATE OF THE POTOMAC HEARINGS

FRIDAY, JUNE 25, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON BICENTENNIAL AFFAIRS,
THE ENVIRONMENT, AND THE INTERNATIONAL COMMUNITY
OF THE COMMITTEE OF THE DISTRICT OF COLUMBIA,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:20 a.m., in room 1310, Longworth House Office Building, Hon. Herbert E. Harris (chairman of the subcommittee) presiding.

Present: Representatives Harris, Meyner, and Gude.

Also present: Glenda Surovell, William Chandler, and Dent Farr, legislative staff assistants; James T. Clark, legislative counsel.

Mr. HARRIS. The subcommittee will come to order.

This is the last of the announced hearings with regard to the state of the Potomac, and we are very interested to hear the testimony from some of the State officials who are especially involved in the problem.

We have as our leadoff witness from the Council of Governments Mr. Frank Lamm, the director of the water resources planning board.

Mr. Lamm, I would like to welcome you here, we look forward to your testimony. I would ask, if at all possible, to limit your initial remarks to the extent you can, so we can ask questions.

STATEMENT OF FRANK LAMM, METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS

Mr. LAMM. Thank you, Mr. Chairman.

My name is Frank Lamm, I am the director of water resources on the staff of the Metropolitan Washington Council of Governments, and also the technical director of the council's water resources planning board.

Mr. Chairman, I have previously submitted a prepared statement, a staff document, going into more details than I intend to go in my verbal statement, but documenting both the previous statement made by Mr. White and my statement this morning.

You have asked me to comment on the charter of the water resources planning board, and its strengths and weaknesses, and I would like to begin by perhaps——

Mr. HARRIS. Before you do, let's put your total statement, together with the addendums, in the record at this time.

Please proceed.

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water quality condition under specific flow regimes. The parameters sampled are: water temperature, dissolved oxygen, conductivity, pH, chlorides (at selected stations), BOD (at selected stations), TOC, Chlorophyll "a", phaeophytin, secchi disk depth, turbidity, total phosphorus, ortho phosphorus, nitrogen series, and total and fecal coliform; measurement, at selected sites, of benthic oxygen uptake rates and algal photosynthesis/respiration rates; measurement of river depth profiles are made where navigation chart soundings are inadequate; Special studies, such as tide velocity measurements, time of travel studies, dye studies, etc.; and biological sampling (benthic macroinvertebrates) at selected sites.

BIOLOGICAL SAMPLING

Biological sampling is tailored for each area and each station depending upon water types (tidal, nontidal, reservoir, flowing stream, etc.), known problems, or anticipated changes. Certain basic components of the biological community, such as the macrobenthos, are sampled at each station as water quality indicators. Through the examination of species present and the calculation of diversity indices, an assessment of water quality can be made.

Maryland believes that monitoring of biological indicators provides the proper means for assessing the long-term changes in water quality in a most cost-effective manner. Sampling for biological indicators may require sampling only once or twice yearly at trend stations (more in areas of intensive monitoring).

Since the established water quality standards are aimed primarily at the protection of the aquatic resources (biota) of the State, it is obvious that an evaluation (monitoring) of these resources is the most effective way to assess the results of pollution control activities, the impact of natural (environmental) conditions (or catastrophies), and the long-term effect of man-made influences such as contaminant slugs, toxic materials and non-point sources (to include land use change effects. Thus, this method would not only assess changes in water quality, but would also assist in establishing priorities for conducting future intensive surveys which would be carried out every 4–5 years or more frequently as conditions indicate and which would be designed to assess causes of changes observed.

Changes in biological communities are believed to be the better indicator of long-term trends of water quality. Changes in the aquatic environment are usually gradual, as are changes in biological communities, making biological sampling both justified and proper.

FUND ALLOCATION PER YEAR RE MARYLAND MONITORING OF POTOMAC RIVER[1]

	State funds	Federal funds (Sec. 106 Grant Funds)
Receiving (open) water monitoring	$70,000	$70,000
Compliance (discharge) monitoring	47,000	10,000
Laboratory services	10,000	
Shellfish monitoring	40,000	
Total	200,000	80,000
Grand total	280,000	

[1] Based on 1976–77 dollars.

Note.—These are rough, ball park figures.
Prepared by: Paul W. Shaul, Jr., July 19, 1976.

Mr. HARRIS. I would like to welcome Mr. Earl Shiflet, the Virginia Secretary of Commerce and Resources.

STATEMENT OF HON. EARL SHIFLET, SECRETARY OF COMMERCE AND RESOURCES, COMMONWEALTH OF VIRGINIA; ACCOMPANIED BY JAMES RYAN, ASSISTANT ATTORNEY GENERAL; AND ROBERT DAVIS, EXECUTIVE SECRETARY, WATER CONTROL BOARD

Mr. SHIFLET. Thank you, we are glad to have you here, sir.

Mr. HARRIS. Thank you. We look forward to your testimony. We place your complete testimony in the record and if you c

summarize it we will appreciate it, so we will have more time for questions.

Mr. SHIFLET. I am Earl Shiflet, secretary of commerce and resources of the Commonwealth of Virginia. Governor Godwin is sorry that he could not be here on your invitation, Mr. Chairman, but he has asked that I come and represent him and present his statement.

I would like to thank you for holding these hearings on the critical water problem in the Washington metropolitan area, and this includes several Northern Virginia communities.

We are hopeful that as a result of these hearings positive action will be formulated, and that Federal, State, and local government agencies will proceed with affirmative action.

With your permission, sir, I would like to present Mr. James Ryan, assistant attorney general, and Mr. Robert Davis, the executive secretary of the Water Control Board, whom I would like to have sit with me to respond to specific questions.

Mr. HARRIS. Fine.

Mr. SHIFLET. Sir, we have responded in a rather voluminous way—35 pages—to your specific questions that you addressed to us, and I will try to make a very brief summary in response to those questions.

VIRGINIA ORGANIZATIONS INVOLVED

Twelve Virginia State agencies are active in the control, regulation, and use of water resources in Virginia. The State water control board is Virginia's primary water resources management agency and exercises a wide range of water resource management responsibilities, particularly the administration of water quality management programs prescribed by Federal and State law. Virginia is still governed by the doctrine of riparian rights. In 1785, a compact between Maryland and Virginia guaranteed its rights in the Potomac River; and in 1940 Virginia joined with other Potomac River basin States in establishing the "Interstate Commission on the Potomac River Basin" known as Incopot. The commission was designed to assist in the management of water resources in the Potomac basin. Incopot has no enforcement or construction authority and must depend upon State and local agencies to carry out its programs.

The Potomac River Basin Advisory Committee was formed in April 1965 by the Governors of the four basin States and the president of the board of commissioners with the District of Columbia to protect State interests during the Federal planning program for the Potomac.

A new Potomac River basin compact was drafted and submitted to the States for consideration in October 1968, and as stated earlier, only Virginia and Maryland enacted the compact. The advisory committee then drafted a Potomac Basin Regional Compact to go into effect upon acceptance by Virginia and Maryland, and the District of Columbia; but as recently as June 1, 1976, a meeting was held by basin State representatives who did not look favorably upon the compact as proposed.

Other concerted efforts in the metropolitan area include the Washington area interstate water resources program, a 2-year effort initiated by the Governors of Maryland and Virginia, and the then Commissioner of the District of Columbia, who recommended, one, the construction of the Verona and Sixes Bridge Reservoirs; two, the inter-

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connection of major water supplies in the District of Columbia metropolitan area, so that the full potential of these supplies to meet peak demands would be utilized; three, the use of the Potomac estuary as an emergency source of water supply after adequate testing from the public health standpoint.

VIRGINIA'S WATER QUALITY PLANNING

Now, in Virginia water quality planning began in 1970 with implementation of the metropolitan regional water quality plan developed by each of the planning districts in the State as a result of Federal statute. These plans were developed as a guideline in future planning, based on existing economic and population projections.

Similarly, another section of Public Law 92-500 required each State to develop a water quality management plan for each of the major river basins in the State. The plan of the Potomac-Shenandoah was completed in January of 1975. The current massive effort to clean up the Potomac in the Washington metropolitan area resulted from a 1969 Potomac Enforcement Conference convened by the U.S. Department of Interior under the provisions of the Federal Water Pollution Control Act.

SEWAGE TREATMENT

Virginia has also been engaged in extensive sewage treatment plant construction in the Potomac basin over the past few years. Over 70 percent of a half-billion-dollar program has been funded for construction of waste treatment plants. This includes both new municipal treatment plants and upgrading existing municipal plants. These facilities have been financed with grants of the Environmental Protection Agency, and in fiscal years 1971-75 with support from the Commonwealth.

The board has also emphasized proper operation of existing treatment plants. The water quality of the Potomac has improved considerably in recent years, and the technicians tell me that generally it is excellent throughout the Virginia portion of the basin.

The water supply program in Virginia is not as extensive or comprehensive as the water quality program. Recommendations have been proposed to develop water resources in the basin. These recommendations by the State water control board include the board's support of the Little River Reservoir as well as the Verona Dam to allow for reservoir flow which could benefit the Washington Metropolitan area; local watershed conservation concepts; local water storage, and establishment of an emergency pumping station in the Potomac Estuary.

The Occoquan policy, adopted by the State water control board in 1971 was an important step in the preservation of the Occoquan Reservoir as a water supply storage for the Northern Virginia area.

Our conclusions, Mr. Chairman, with respect to water pollution control and water pollution problems in the Potomac Basin generally for the Nation's Capital area specifically are as follows:

First, Virginia now has excellent water quality control programs for point sources of pollution, and has adequately coordinated efforts to continue control of point sources of pollution, although there are not

adequate programs as yet to properly control nonpoint sources of pollution.

Second, there is general agreement as to the technical means of meeting water supply needs for the metropolitan Washington area, but current institutional arrangements seem to be deficient. Clearly, the metropolitan area is dependent upon the upper basin, which includes portions of West Virginia, Pennsylvania, Maryland, and Virginia, for most of its water supply. We believe that more emphasis should be placed on utilizing existing interstate compacts, or a similar instrument, to resolve these issues. Additional compact amendments may be necessary in order to deal adequately with the situation.

But it is believed and is my hope that this issue could be appropriately dealt with by the respective governments within the area, without the necessity of involving the Federal Government.

Third, to give high priority to the development of mechanisms for low-flow allocation and management of reservoir releases, which would protect the water rights in the States and in the District of Columbia, but which would also recognize the water needs of the entire community.

Fourth, take appropriate measures, communitywide, to assure that water is not wasted. Encourage communitywide review of water use rates to discourage waste to discourage peak demand and to assure, to the extent practicable, that charges for water services will be adequate to support the construction, operation, and maintenance of dams and impoundments, pipelines, monitoring systems and treatment plants. This has proven to be a sound principle in other parts of the Commonwealth.

The success or failure of a program for both pollution control and water supply depend upon public support. We must do what we can to assure that people understand the issues, the optimal solutions and the costs.

These hearings are a commendable step in this direction, Mr. Chairman. I commend you for holding them.

[Mr. Shiflet's complete statement follows:]

STATEMENT OF EARL J. SHIFLET, SECRETARY, OFFICE OF COMMERCE AND RESOURCES, COMMONWEALTH OF VIRGINIA

Good morning Mr. Chairman and distinguished committee members. I am Earl J. Shiflet, Secretary of Commerce and Resources for the Commonwealth of Virginia. I would like to thank you for holding hearings on the critical water supply problem in the Washington area as this includes several northern Virginia communities. We are hopeful that as a result of these hearings some positive action will be formulated and the Federal, State and local government agencies can proceed with affirmative action.

The Office of Commerce and Resources is responsible for overseeing the various activities of State agencies concerned with environmental factors and which, through action or decision affect water quality and water supply in Virginia.

STATE ORGANIZATIONS RESPONSIBLE FOR WATER QUALITY AND WATER SUPPLY

Water quality and water supply in the Commonwealth are regulated by numerous agencies under the Office of Commerce and Resources in addition to other State agencies which impinge upon water quality and/or water supply. The following agencies, either by authorized duty or decision, affect the planning, policy and management of Virginia's waters.

The State Water Control Board is Virginia's primary water resources management agency and exercises a wide range of water resource management respon-

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sibilities. One broad area of responsibility is administration of the water quality management program prescribed by Federal and State law. This includes such duties as establishment of water quality standards, issuance of waste discharge permits, and administration of the construction grants program for publicly owned waste treatment facilities. In addition to its water quality program, the State Water Control Board is responsible for water resources policy formulation, comprehensive river basin planning, designation of critical groundwater areas and administration of allocation controls therein. State co[illegible]ntion of the National Flood Insurance Program, and administration of a dam safety program.

The Regional Director has management authority within the boundaries of his region for the execution of State Water Control Board programs. He also manages matters within his region regarding water and related land resources through close and continuous communications with the elected and managerial heads of political subdivisions; industries, conservation, wildlife, citizen-action and other organizations interested in water resources.

Once vested with major water resource management responsibilities, the Department of Conservation and Economic Development now possesses largely ancillary functions arising from its authority to acquire and/or manage various types of land areas which may include or affect waters within the State. Primary activities in this category include forestry operations, ownership and management of recreational land, and control of mined land reclamation.

The Governor's Council on the Environment exercises several responsibilities related to environmental protection. These duties include a continuing assessment of environmental conditions and choices confronting the Commonwealth, coordination and review of the State's environmental program, coordination of environmental impact analysis procedures and permit processes, and environmental education.

The Virginia Soil and Water Conservation Commission exercises general supervision over State programs for soil conservation and certain water resource development projects in small watersheds. Primary responsibility for implementation of these programs has been delegated to the State's soil and water conservation districts and other political subdivisions, but the Virginia Soil and Water Conservation Commission provides various forms of coordination and assistance, including the exercise of certain regulatory authority concerning local implementation. One of the agency's most significant functions in water resources management is exercising its authority to approve or disapprove proposed projects involving federal funding under the small watershed program. Another important responsibility is preparing erosion and sediment control guidelines for local programs to regulate land disturbing activities, and reviewing permit decisions by soil and water conservation districts.

Responsibilities of the Department of Agriculture and Commerce related to water resources consist of control over pesticides application advice on fertilizer application. Both of these substances are potential water pollutants. The Department of Agriculture and Commerce also administers state law applicable to fertilizers, but its activities are limited to consideration of product quality and reports of sales.

Other agencies within the Office of Commerce and Resources which affect water quality and supply include the Commission of Game and Inland Fisheries, the Commission of Outdoor Recreation, the Marine Resources Commission, the Virginia Institute of Marine Science and the Virginia Port Authority.

The Commission of Game and Inland Fisheries exercises a number of responsibilities related to management of the state's fish and wildlife resources. It has broad authority to adopt regulations concerning hunting, fishing, and trapping, and it is responsible for enforcement of these regulations and applicable laws, including those concerning boating and water safety.

The basic responsibility of the Commission of Outdoor Recreation is development and maintenance of a comprehensive plan for outdoor recreation in the Commonwealth. The agency exercises a degree of control over implementations of the Virginia Outdoors Plan through its control over Federal and State funds appropriated for outdoor recreation purposes. The Commission of Outdoor Recreation also is responsible for recommending streams for inclusion in the State's Scenic Rivers Program.

The Marine Resources Commission enforces laws concerning the operation of commercial and recreational fisheries in Virginia's tidal waters, and possesses somewhat limited authority to adopt and enforce its own regulations concerning fisheries. The agency controls use of the publicly owned beds of the State's tidal

waters, including operation of an extensive program of leasing shellfish grounds. It also has several responsibilities under the wetlands program, including development of guidelines for wetlands use, review of the decisions of local wetlands boards, and administration of permit program where localities fail to act.

The Virginia Institute of Marine Science, primarily an educational and research-oriented agency, has largely been concerned with physical and biological oceanography. Educational programs have been offered in affiliation with certain of Virginia's educational institutions and the Virginia Institute of Marine Science provides advisory services concerning marine affairs to other State agencies and officials. The basic mission of the Virginia Port Authority is to carry out unified operation of the various ports of the State. The Virginia Port Authority is authorized to conduct a program to coordinate the previously independent port operations of the various port cities. The agency is also authorized to operate, develop, and promote port facilities within its control.

Other State offices, the Office of Education, the Office of Human Affairs, including the Department of Health, the Office of Transportation, including the Department of Highways and Transportation, and the Attorney General's Office have duties which relate to the development and maintenance of water quality and supply.

The Virginia State Department of Health is responsible for a wide range of activities related generally to public health, several of which involve aspects of water resource management. A primary responsibility in this category is regulation of public water supplies. The State Health Department also exercises control over certain waste disposal operations, including septic tank use and disposal of solid wastes and toxic substances, and acts in an advisory capacity to the State Water Control Board regarding large sewage treatment plants. Other relevant functions include seafood sanitation, radiation control, mosquito control, enforcement of the Safe Drinking Water Act.

The State Department of Highways is authorized to acquire property necessary for highway construction, including water rights by eminent domain if necessary. It may also, with Marine Resources Commission concurrence, remove construction materials from State-owned streambeds.

The most significant function of the State Corporation Commission in the area of water resources management is its regulation of hydroelectric and certain other dams within the State. A permit from the State Corporation Commission is necessary prior to construction, and the Attorney General has held that SCC authority to specify flow releases is superior to that of other agencies. The State Corporation Commission also regulates public utilities such as water and sewer companies.

The Office of the Attorney General serves as the legal advisor and counsel for the State in matters concerning water policy decisions. The Attorney General's Office issues official opinions which determine State water policy such as definition of sediment as pollution, enforcement of water quality standards, and stream flow releases. The Attorney General's Office functions as negotiator and arbitrator in disputes over water policy rights. Notable court actions in the northern Virginia area include the Virginia State Water Control Board vs. Washington Suburban Sanitary Commission (Pine Plains Sewage Treatment Plant) decision, the Loudoun B. H. Bogle Company No-Discharge Permit problem and the Manassas Park litigation concerning proportional share for the Occoquan Watershed Monitoring Program which has been turned over for appropriate action.

WATER RESOURCE REGULATIONS AND PROGRAMS

Water quality planning, policy and management are ultimately regulated by the provisions of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500). This Act provides for State responsibility in the elimination of pollution in Section 101(b); the development of treatment facilities under Section 201; areawide waste treatment management under Section 208; development of Level B Water Resources Planning under Section 209; the development of water quality standards and a continuing planning process under Section 303; marine sanitation devices under Section 312; and the issuance of permits under the national pollutant discharge elimination system under Section 402. P.L. 92-500 defines Federal responsibility for financial assistance for the construction of sewage treatment facilities, the responsibilities and duties of the Environmental Protection Agency and the coordination and administrative actions

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the Federal government in supervising and approving programs carried out by the States as defined under P.L. 92-500.

The Act does not provide a mechanism for the abatement of water quality problems caused by pollutants from non-point sources, i.e., sediment from agriculture or runoff from urban areas. This shortcoming may be of considerable importance in the Washington Metropolitan Area.

Water quality planning policy and management for State waters as required by P.L. 92-500 are vested with the Virginia State Water Control Board. Water supply, however, is a different matter. The Federal government has numerous agencies which have conflicting interests, and in Virginia, the State Water Control Board has planning responsibilities but no authority to develop or provide funds for implementing these water supply plans. The State Department of Health is responsible for the public health aspect of water supplies. On the local level, Virginia places a great emphasis on the autonomy of local governments regarding the use and supervision of water supply and quality by local water and sanitation authorities under the provisions of State law. This arrangement has worked well in the past where problems were of a simple nature and local solutions could be provided. As water quality and supply problems have become more complicated, better management techniques are needed to provide more comprehensive solutions. It is believed that existing coordination in the Washington Metropolitan Area among Virginia, Maryland and Washington, D.C. water quality and supply organizations are unable to effectively implement and develop solutions consistent with the magnitude and complexity of the needs.

Virginia has developed a strong water quality program covering provisions of P.L. 92-500 and the needs of individual areas of the State. Virginia does not have, however, a water supply program that is as comprehensive as its water quality program.

WATER QUALITY COORDINATION IN THE METRO AREA

Water quality plans and programs in the Washington Metropolitan Area have been derived in numerous ways. Some plans have been a result of legal proceedings, some a result of judicial decisions and some a result of federal laws.

Coordinated efforts to improve the water quality in the Potomac River began with the Potomac Enforcement Conference, first convened 20 years ago.

The Potomac Enforcement Conference was a legal proceeding instituted under the provisions of the Federal Water Pollution Control Act and was intended to set forth all measures necessary for attainment of adopted water quality standards. The "conference" consisted of the water pollution control agencies of Maryland, Virginia, the District of Columbia, Interstate Commission on the Potomac (INCOPOT) and the Federal Water Pollution Control Agency. The Conference findings, upon adoption by the Secretary of the Federal Agency in which the various pollution control agencies were located, had the power of law.

The conference first convened in 1957, and was reconvened in 1969. The 1969 Conference findings, a series of fifteen recommendations, were adopted by the Secretary of the Interior as the basis for pollution control in the Metropolitan segment of the Potomac. The Commonwealth of Virginia accepted the recommendations of the conference relative to upgrading treatment levels of the Virginia sewage treatment facilities, and has implemented 11 of the recommendations.

At the December, 1970 Progress Meeting of the Potomac Enforcement Conference, the EPA's Chesapeake Technical Support Laboratory recommended that effluent limitations be imposed on the major dischargers into the small tidal embayments of the Potomac Estuary. In April of 1971, the EPA published a water resource-water supply study of the Potomac Estuary based on the findings of its Chesapeake Technical Support Laboratory.

The Virginia State Water Control Board held a public hearing in March of 1971 to consider the Federal recommendations for embayment water quality limits. As a result of this hearing, the limits recommended were modified somewhat by the State Water Control Board.

In June of 1971, the Virginia State Water Control Board adopted stringent water quality limits applying to the effluents of all sewage treatment plants discharging to Potomac River embayments in Virginia from Jones Point to Marlboro Point. The Board also directed that any expansions of existing plants discharging into the non-tidal tributaries of these embayments also be required to meet the standards.

The Employment Standards are somewhat more restrictive than the limits set in the Potomac Enforcement Conference, and should help to further improve the water quality in the Potomac River.

As previously mentioned, water quality policy and plans are developed not only from conference decisions and direct federal legislation, but occasionally, from a decision affecting the use of waters. Such a case is that of the Blue Plains Agreement.

The Commonwealth of Virginia has supported the District of Columbia's efforts for regional development of sewage transport, treatment, and disposal facilities in the Washington Metropolitan Area. The concept employed for Virginia was that of transporting wastes to the Blue Plains treatment plant. This was initiated in the early 1960's to provide service to the then uncompleted Dulles International Airport and to safeguard the Potomac River raw water supply intakes from possible contamination. The Act of Congress authorizing the construction of the Dulles sewer did not, however, make provisions for treatment of the waters to be transported.

In June of 1970, an Enforcement Conference decision was made to limit the expansion of the Blue Plains plant to 309 mgd capacity, a reduction of 110 mgd from the 419 mgd capacity envisioned in 1969. Among the reasons cited for this decision were high quality effluent requirements, objection of the Department of the Interior to the filling in of submerged lands adjacent to the plant, and the relationship of flows in the Potomac River to available levels of waste treatment technology. This decision resulted in a situation wherein the conveyance capacity in the Potomac Interceptor (Dulles Interceptor) serving Northern Virginia and part of Maryland, exceeded the treatment capacity in Blue Plains allocated to Northern Virginia and Maryland.

In an effort to gain full utilization of the Potomac Interceptor/Blue Plains System of conveyance and treatment of sewage, a Memorandum of Understanding was entered into by the District of Columbia, Washington Suburban Sanitary Commission, and Fairfax County in October of 1970. The memorandum provided that:

(1) For the District of Columbia to meet the District of Columbia's ultimate obligatory requirement it must provide treatment for at least 65.0 mgd of Potomac Interceptor sewage, to include 43.7 mgd for Northern Virginia for the year 2000.

(2) Treatment for the 65.0 mgd flows is to be accomplished by the participation of Virginia in the regional Washington Suburban Sanitary Commission wastewater treatment facilities. Specifically, the regional flow trade-offs would involve the proposed Montgomery County 60 mgd Advance Wastewater Treatment (AWT) plant at Dickerson and the proposed expanded and upgraded 60 mgd AWT Piscataway facility in Prince George County.

The District of Columbia notified the U.S. Environmental Protection Agency that in July 1976, the Blue Plains Plant would accept flows totaling 309 mgd at full secondary treatment in accordance with the NPDES permit. Virginia's share of the 309 mgd Blue Plains treatment capacity transported through the Potomac Interceptor is a total of 12.6 mgd. Use of capacity beyond this allocation is not possible unless wastewater treatment facilities under consideration in Maryland are constructed. Based on sewered population projections, Northern Virginia's 1985 needs are an additional 14.0 mgd. This leaves a significant portion of the Potomac Interceptor capacity (17.1 mgd) for future use.

The continuing delay in providing Virginia with treatment capacity in the District of Columbia's sewage treatment system to match the full transport capacity in the Potomac Interceptor has compelled Virginia to find a temporary solution to the problem. In response to this problem, 10 mgd of Northern Virginia's wastewater will be treated at Virginia's Lower Potomac Wastewater Treatment Facility until the year 1985. This action allows several years flexibility to clarify the issues regarding the quantity and timing of additional flows to the Washington Regional system.

In June of 1974 the Blue Plains Sewage Treatment Plant Agreement was signed by Virginia, Maryland, the District of Columbia and the EPA. The agreement was incorporated into a Federal Consent Decree settling the law suit filed by the Virginia State Water Control Board and others on September 24, 1973.

The terms of the Agreement supplemented the terms and conditions of the 1970 Memorandum of Understanding and the 1971 Interim Treatment Program Agreement. The Agreement covered the allocation of the flows to each user juris-

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diction, as well as control of sewage flows, flow reporting, measuring and monitoring reduction of flows, correction of raw sewage overflows, and sludge management.

On July 2, 1975, the Blue Plains Principals (Virginia, Maryland, District of Columbia and Environmetal Protection Agency) resolved that Prince Georges and Montgomery Counties of Maryland reduce equally their allocations to Blue Plains on a permanent basis to permit treatment of the excess District of Columbia flows. It was further resolved that both counties should further reduce equally their allocations to Blue Plains on a temporary basis to permit treatment of Virginia flows through 1985 and that both county's allocations in Blue Plains would rise back up by 1990 to their original allocations, less the flows permanently allocated to the District of Columbia.

The Principals were notified that the terms of the July 2, 1975 resolution were unacceptable to Virginia. Virginia cannot enter into any negotiations which do not explicitly provide permanent provision for treating the Virginia Potomac Interceptor design flows after 1985 through the District of Columbia's sewerage system. Virginia considers the terms and conditions of the 1970 Memorandum of Understanding and the Consent Decree of June 1974 as valid, applicable, and enforceable.

Water quality management plans for the Virginia portion of the Potomac River Basin have been developed in accordance with the requirements of 18CFR 601.32 and 33, and P.L. 92-500, Section 303(e) respectively. Some additional water quality planning has developed as a result of specific problems in the Occoquan watershed.

For a number of years, serious water quality problems existed in the Occoquan watershed. In July of 1971, the Virginia State Water Control Board adopted "A Policy for Waste Treatment and Water Quality Management in the Occoquan Watershed". The purpose of this policy, known as the "Occoquan Policy", was to remedy the water quality problems and to protect the quality of the Occoquan Reservoir, which is the water supply for approximately 500,000 persons in the Northern Virginia area. In addition to requiring that all new plants in the Occoquan watershed meet certian technical and administrative requirements, the policy also established a flow allotment for treated wastewater discharged within the watershed for the period between 1971 and 1985-90. The policy also establishes a long-range policy for regional wastewater treatment plants, plant capacity allotments, and an interim expansion program for existing plants in the watershed.

Based on the Occoquan Policy, a revolutionary type of waste treatment and management is being implemented in the Occoquan Watershed.

WATER QUALITY PLANNING IN VIRGINIA

The first step in water quality management planning in Virginia began in 1972 with the Metropolitan/Regional (M/R) Water Quality Management Plans developed by each of the planning districts in the State in response to the requirement of 18CFR601.32 and 33. A planning district is a group of counties (and cities) with similar economic and physiographic characteristics. The boundaries for a planning district are the political boundaries of the member governments rather than watershed or river boundaries.

Each of the six planning districts located partly or wholly in the Potomac River Basin developed an M/R plan. The M/R program used existing and projected economic, demographic and waste loading information to determine the planning district needs for protecting or upgrading water quality.

The M/R planning program provides for regional consideration in water quality management planning and lays a strong framework for facilities planning under Section 201 of P.L. 92-500.

Under the provisions of Section 303(e) of P.L. 92-500, Federal Water Pollution Control Act Amendments of 1972, the states are required to prepare water quality management plans for each major river basin in each state.

In September of 1973, the Virginia State Water Control Board hired the consulting firm of Camp, Dresser and McKee, Inc. to prepare a river basin water quality management plan for the Virginia portion of the Potomac-Shenandoah River Basin. The completed plan was submitted in January of 1975.

The purpose of the 303(e) plan is to coordinate and direct the State's water quality decisions on a river basin scale. The plan identifies and sets forth measures

to correct the Basin's water quality problems including a determination of existing water quality, recommendations for revision of water quality standards, and determination of significant point and nonpoint sources of pollution. The plan sets forth a remedial program for those problems including effluent limitations or other control strategies, identification of 201 facility planning, designated 208 areawide planning needs, priorities for municipal facilities planning and for construction grants and the timing of the plan implementation.

Currently, due to the application of recommended water quality plans, the Water Quality in the Potomac-Shenandoah River Basin is generally excellent. Of the total 3,340 stream miles in the Basin 3,152 miles (01.9 percent) are currently meeting the "fishable and swimmable waters" criteria of P.L. 92–500.

With the exception of an overall increase in nitrogen, the general water quality in the Basin is quite good. The 1976 Virginia Water Quality Inventory 305(b) Report prepared pursuant to Section 305(b) of P.L. 92–500 shows trends of improving water quality for the following water quality parameters: dissolved oxygen, pH, fecal coliform bacteria, total phosphate and ammonia. Orthophosphates nitrites and total Kjeldahl nitrogen showed varying degrees of worsening trends which are not limited to isolated areas in the Basin. Table I is indicative of the trends.

TABLE 1.—POTOMAC-SHENANDOAH RIVER BASIN REFERENCE LEVEL VIOLATIONS, 1968–75 PERCENT

Parameter	Reference level and source	Percent of observations exceeding reference level		
		1968–71	1972–75	Change
Dissolved oxygen	[illegible] mg/l—Aquatic life	2.5	1.9	−1.6
Temperature	[illegible]°F—Aquatic life	0	.2	+.2
Suspended solids	[illegible] mg/l—Aquatic life	8.2	8.0	−.2
pH	[illegible] to [illegible]—Aquatic life	6.5	3.8	−2.7
Total coliforms	[illegible]/100 ml—Recreation	32.5	11.2	−21.3
Fecal coliforms	[illegible]/100 ml—Recreation	24.9	12.9	−12.0
Orthophosphate (as P)	[illegible] mg/l—Nutrient	48.3	47.6	+27.3
Total phosphate	[illegible] mg/l—Nutrient	24.7	20.2	−4.5
Ammonia (as N)	[illegible] mg/l—Aquatic life	24.1	14.2	−9.9
Nitrite (as N)	[illegible] mg/l—Nutrient	.5	.5	0
Nitrate (as N)	[illegible] mg/l—Nutrient	44.7	54.7	+10.0
Total kjeldahl nitrogen	[illegible] mg/l—Nutrient	35.8	23.0	−12.8
Chlorides	[illegible] mg/l—Water supply	0	3.1	+3.1

[illegible] "Guidelines for Developing or Revising Water Quality Standards," EPA Water Planning Division, April 1973.
[illegible] "Criteria for Water Quality" EPA, 1973 (section 304(a)(1) guidelines).
Biological Associated Problems in Freshwater Environment", FWPCA, 1966 pp. 132–3.

Source: Virginia State Water Control Board.

Virginia has been engaged in extensive sewage treatment plant construction in the Potomac Basin over the past few years. This construction includes both new municipal treatment plants and the upgrading of existing municipal systems.

Most of these facilities have been financed with grants from the U.S. Environmental Protection Agency and from fiscal years 1971 through 1975, from the Commonwealth.

Table 1–A illustrates the status of funding for Potomac Basin waste treatment plants. It should be noted that the Basin is divided into four separate areas, and that the funded portion of the plants represents approximately 70 percent of the funds needed for completion of current projects.

In waste treatment plants that had been allowed to become overloaded as a result of increasing loads the State Water Control Board successfully worked with the owners of the offending plants to provide "interim treatment" schemes to allow operation of the plants at or below permitted loadings. Interim steps have included the use of chemical additions and the use of molecular oxygen to improve the plant operations. Plate 1 shows results of interim treatments begun in 1970 at three Fairfax County treatment plants.

It is evident that Virginia's program to improve water quality in the Potomac Basin are moving forward.

Plate 2 is a vivid indication of reduction of pollutants discharged to the Potomac from the Northern Virginia area.

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PLATE 1

FAIRFAX COUNTY

WESTGATE, LITTLE HUNTING CREEK, DOGUE CREEK

TOTAL EFFLUENT CHARACTERISTICS

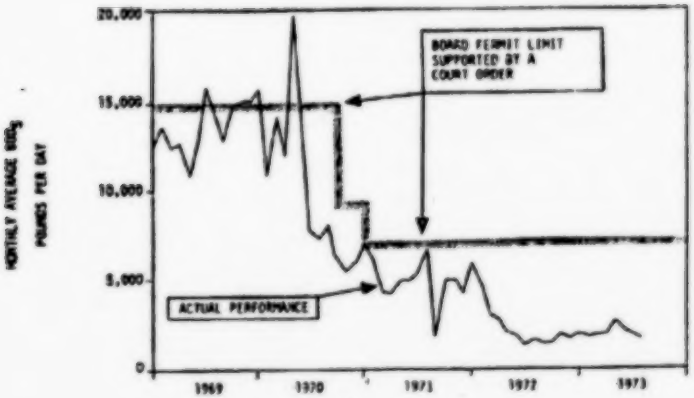
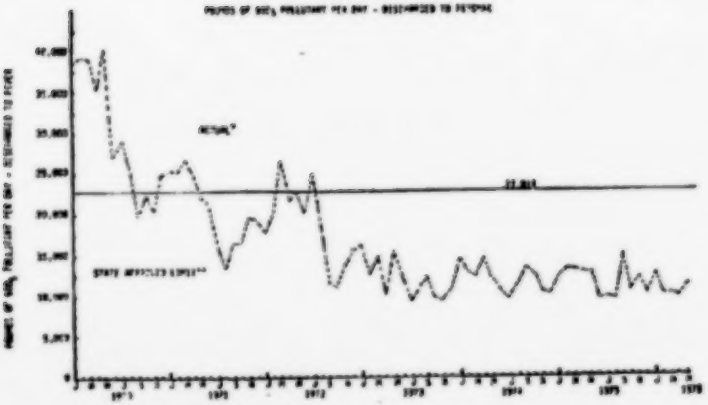


PLATE 2



* Includes effluent lost due to by-passing.

** For Arlington, Alexandria, Westgate, Little Hunting, Dogue, and Lower Potomac Plants.

TABLE 1A.—WASHINGTON METROPOLITAN AREA WASTE TREATMENT PROJECTS

	Funded	Not funded
Upper Potomac basin (Shenandoah)	$21, 875, 000	$ 52, 500, 000
Washington metro area	154, 850, 000	70, 500, 000
Upper Occoquan sewer authority	72, 600, 000	0
Lower Potomac area	94, 950, 000	5, 100, 000

1 Additional funds required upon completion of facilities plans.

Another area of major consideration to any discussion of water quality in the Basin are the industrial discharges. There are presently twenty major industrial discharges and over 200 small industrial discharges. All of these discharges in the Potomac River Basin are permitted and monitored under the National Pollution Discharge Elimination System, Public Law 92-500, otherwise known as the NPDES Program. The discussion here will focus on the major discharges in the Basin—that is those discharges with a flow greater than 0.5 mgd of effluent.

Monitoring records from the nine largest discharges in the Basin yield some interesting data. During the 3-month period from February 19, 1976 to April 1976 there were a total of only fourteen violations of permit limits from all the discharges combined. When it is considered that there are fourteen parameters monitored for each discharge per month, this total of fourteen violations does not appear to be significant. Most of the violations were isolated cases of exceeding a parameter once during the reporting period. Only one discharger had more than two violations during the reporting period, and they have submitted plans and specifications to correct this problem.

From the monitoring and surveillance of the nine largest industries in the Basin, it appears that industry is meeting the task of cleaning up their share of the water quality problem in the Basin.

All of the major industries in the Basin are now meeting the water quality standards or have the best practicable control technology (BPT) in use, or they are meeting a compliance schedule to have the BPT on line by 1978.

As you can see, the water quality planning, management and implementation in the Potomac River Basin is well advanced. We feel that any problems we may have had are nearing solution.

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WATER SUPPLY REGULATIONS AND PROGRAMS

In recent years, the Washington Metropolitan area has experienced explosive growth in population along with increased demands for water supply. In order to fulfill these demands, policies and programs to deal with increased demand have been developed for the D.C. Metro area.

The 1968 Virginia Water Resources Planning Act (as amended in 1972) concerned the Potomac area water supply in Virginia. The Act described a four-step process to be administered by the Virginia State Water Control Board with respect to water resource policy and management:

1. To study the supplies, needs, and uses of water;
2. To "formulate a coordinated policy for the use and control of all water resources in the State and issue a statement thereof";
3. To "devise plans and programs for the development of the water resources of the State" for each of the nine principal river basins in Virginia; and
4. To "recommend to the General Assembly any additional legislation the Board may deem necessary or desirable for the accomplishment of such plans or programs."

In addition, the Board is authorized to speak and act for the State in "all matters directly related to conservation or use of the State's water resources" and to appear and testify for the State before any Committee of the Congress, agencies of the Federal government, General Assembly, or any court or commission of any State.

In summary, the General Assembly has given the State Water Control Board a broad substantive mandate for the development of water resource policy and water resource management plans for the Commonwealth and has designated

the Board as the State's spokesman on water resource and related issues. However, the General Assembly has retained the authority for implementing water resource plans and programs developed by the Board.

The Water Resources Planning Act also provided for the development of the Potomac-Shenandoah River Basin Comprehensive Water Resources Plan series which was developed in 1968–1970. One volume of that series, Development Alternatives, 1970, provided twenty eight recommendations which included the immediate development of the Middle River Reservoir (the Corps of Engineers' Verona Project) for water supply for the Augusta, Staunton, Waynesboro area and for reservoir flow release that could provide considerable benefit to the Washington D.C. Metropolitan area; a recommendation for overall support of local watershed conservation concepts and support of Public Law 566 and 534 projects which included water supply storage in upper watershed reservoirs constructed by the Soil Conservation Service; and a recommendation that a permanent raw water pumping station for emergency use only be established in the Potomac Estuary.

Many of the other recommendations dealt with groundwater potential and flood control both structural and non-structural.

It was increasingly apparent that an important water supply source for the Washington Metropolitan Area was in serious danger. The Occoquan Reservoir located in Fairfax and Prince William Counties was undergoing accelerated eutrophication. The Virginia State Water Control Board recognized that if the situation were to continue, the Reservoir would soon be useless as a source of potable water supply. This was a critical problem because the Reservoir serves over a half a million Northern Virginia residents. Comprehensive technical studies showed that there were two causes to the problem. First, there were discharges of inadequately treated sewage upstream from the Reservoir, and the volume of these discharges was increasing because of the rapid urbanization of the watershed. Second, because of the rapid urbanization, the amount of nutrient-rich urban runoff from these developing areas was increasing, thus contributing to the eutrophication problem.

Accordingly, the Board formally adopted, as a regulation, the Occoquan Policy of 1971 in order to halt and reverse the eutrophication of the Occoquan Reservoir.

Rapid expansion and accompanying population growth in the Washington Metropolitan Area has generated increased construction resulting in erosion problems from runoff. This growth has increased demands for services such as water supply and wastewater treatment but no provision had been made for adequate water supply. Wastewater treatment facilities, in need of upgrading, contrived to pour inadequately treated sewage into streams which were already degraded below applicable stream standards.

The Interstate Commission on the Potomac River Basin was formed in 1940 to assist in the abatement of water pollution in the Potomac River. Compact members Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia, form the Commission. Virginia is represented by three members. The Interstate Commission on the Potomac River Basin is not a regulatory agency, however, and has no enforcement authority; it must depend upon the support of authorized agencies in order to meet its goals.

The Potomac River Basin Advisory Committee was formed in April 1965 by the Governors of the four basin States and the President of the Board of Commissioners of the District of Columbia to protect State interests during the Federal Planning Program for the Potomac. The Potomac River Basin Compact was drafted and submitted to the Governors for consideration in October of 1968. The Virginia General Assembly enacted the Compact in May 1970, Maryland in 1971, but problems resulted over approval in other basin states. The Advisory Committee then drafted a "regional" plan, the Potomac Water Resources Regional Compact, by which the Compact could go into effect upon acceptance by Virginia, Maryland and the District of Columbia.

On June 1, 1976, representatives of the basin States and the District of Columbia met to discuss the wishes of the current Governors regarding the water resources planning in the Potomac and the further functioning of the Advisory Committee formed in 1965. Generally, the meeting was unfavorable to either the first proposed Compact or the regional proposal, and passage of the Compact seems unlikely.

The Governors of the States of Maryland and Virginia and the Commissioner of the District of Columbia recognized the critical need for concerted action on a regional basis. By joint resolution they formed a policy committee and a

task force of representatives of the three jurisdictions and the Metropolitan Washington Council of Governments to develop an action program which would provide solutions to the water resources problems of the area. The result was the Washington Area Interstate Water Resources Program (WAIWRP). WAIWRP recognized that the Metro Area had a greater demand for water than the Potomac River Basin is able to supply naturally during low flows. On August 16, 1972, a joint resolution by these three officials established a policy committee and a task force to make an intensive review of previous investigations, prepare a detailed analysis of future needs and existing facilities, and consult with officials of local jurisdictions and citizens groups concerning water resource problems. The Chairman of the State Water Control Board was made a member of the policy committee, and the Board staff provided two members for the task force and made available needed information and services.

Early in 1973, the policy committee of the WAIWRP released its report. As to water supply, the major recommendations were construction of the Verona and Sixes Bridge Reservoirs to add to the base flow of the Potomac River; interconnection of major water supplies in the immediate D.C. Metro area so that the full potential of these supplies to meet peak demands for water could be utilized; and construction of the facilities necessary to evaluate the suitability, from a public health standpoint, for emergency use of the Potomac Estuary as a source of water supply.

In the wastewater treatment area, the major recommendations were completion of the Blue Plains sewage treatment plant at the earliest possible date; immediate construction of the Montgomery County wastewater treatment plant on the Dickerson site; implementation of the Maryland plan for the Anacostia River Basin; and completion of advance waste treatment facilities at existing treatment plants in Maryland and Virginia as rapidly as possible.

These and other recommendations included in the report have been implemented to some degree, but not to the extent that the D.C. Metro Area water supply problems and water quality problems can be considered to have been solved.

In recent years several important studies made by the Army Corps of Engineers in their evaluation of long range water supply problems have consistently mentioned the Verona Dam and Lake Project as being urgently needed for assuring adequate water for the Washington, D.C. Metropolitan Area.

The State Water Control Board at its regular meeting in June 1973 considered the Proposed Verona project and took action supporting its construction and operation. Shortly afterwards the Governor of Virginia reported to the Chief of Engineers that the Commonwealth of Virginia supported the project. The Board's action supporting the project was contingent upon certain conditions being met. The conditions of approval briefly are that:

1. A special funding formula be established for the nonfederal costs so that the costs were borne as much as possible by the beneficiaries
2. A sedimentation plan be established to protect the reservoir from erosion in the Verona Dam drainage basin
3. The flow from the reservoir to the estuary be guaranteed undiminished
4. The northern Virginia localities implement to the extent possible the Washington Area Interstate Water Resources Program Report recommendations regarding interconnections, local storage, and water conservation

The Board's staff has been working with the Corps of Engineers, localities near the project, and the Washington area users in trying to resolve each of these problems.

Another factor affecting water supply is the doctrine of riparian rights. Riparian rights, the right of waterfront property owners to the access and use of the shore, bed and waters adjacent to his property, has been a significant factor in the allocation of water in the Washington Metropolitan area. Since Potomac waters are involved in a riparian rights compact, low flow conditions can cause allocation problems.

Virginia's riparian right to the Potomac River is guaranteed by the 1785 Compact between Maryland and Virginia. Under the provisions of the 1785 Compact, Virginia is entitled not only to full dominion over the soil to low water mark on the south bank of the Potomac, but has a right to such use of the river beyond the line of low water marks as may be necessary to the full enjoyment of her riparian ownership on an equal basis with Maryland. The usual allocation under the pure riparian system, involving two or more users on the opposite sides of

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a stream where the water supply is insufficient to meet all demands is to allot to each equal flow.

The increasing use of the waters of the Potomac River in and adjacent to Virginia in the Washington Metropolitan Area has caused alarm as to whether the natural flow in the Potomac River will supply the needs. In several years, during low flow or drought periods, the quantity is expected to be less than that required to meet the demands for all customary public water supply purposes. This fact has caused the United States Government (i.e. the Chief of Engineers), the State of Maryland, the Washington Suburban Sanitary Commission and the City of Rockville, Maryland to propose the Potomac River Low Flow Allocation Bill (HR 12215).

Virginia historically has been very generous with its Potomac water rights. The State has allowed the natural low flow of the river to be used by the Washington Suburban Sanitary Commission, City of Rockville and the Corps of Engineers to withdraw on an average basis, a total of approximately 300 mgd with Virginia communities receiving only about 38 mgd.

If we compare outstanding withdrawal permits issued by the Maryland Department of Natural Resources together with the peak withdrawal of the Washington Aqueduct System, we find that approximately 500 mgd would be withdrawn, of which Virginia communities would receive only 79 mgd. Virginia's permit withdrawals are described in Table 2.

TABLE 2

Location:	Millions gallons/day
Leesburg	[1] 3
Fairfax County	[1] 24
Arlington Water Authority, part of Fairfax County	[2] 52
Total	79

[1] Basis for allotment: Permit.
[2] Basis for allotment: Peak Virginia use.

While the 1-day natural low flow of the Potomac on a frequency of once in 30 years is only 444 mgd, any low flow allocation reduction based upon past usage would not give Virginia her fair share of the Potomac waters.

Virginia flow allocation from the Potomac based upon any one of three views presented in the following four tables would be 222 mgd, 204 mgd or 156 mgd.

From these analyses it is clear that Virginia is entitled to much more of the Potomac natural flow before being required to provide augmentation through storage. The need for a realistic, equitable allocation of natural low flow Potomac waters is long overdue.

TABLE 3.—*Potomac River Basin flow allocation by equal allocation—1-day/30-year low flow above Washington, D.C.*[1]

Riparian interests:	MGD
Virginia areas on the southside of the Potomac River	222
Maryland and areas on north side of the Potomac River	222
Total drainage area above Little Falls (near Washington, D.C.)	444

[1] This assumes that at the points of withdrawal that both sides of the river have equal water rights.

TABLE 4.—POTOMAC RIVER BASIN, FLOW ALLOCATION BY HYDROLOGIC CONTRIBUTION, 1-DAY/30-YR LOW FLOW ALLOCATION ABOVE WASHINGTON, D.C.

Riparian States	MGD/Square mile	MGD[1]
Virginia (based on Wytheville, W. Va. gage)	0.0565	204
Maryland	.0242	88
West Virginia (based on Shepherdstown, W. Va. gage)	.0252	91
Pennsylvania	.0092	53
Total drainage area above Little Falls (near Washington, D.C.)	.0123	444

[1] Calculated as: MGD equals (CFS/square mile) (drainage area) (0.64 MGD/ FS)

TABLE 5.—POTOMAC RIVER BASIN, FLOW ALLOCATION BY DRAINAGE AREA CONTRIBUTION, 1 DAY/20 YR LOW FLOW ABOVE WASHINGTON, D.C.

Riparian States	Drainage area (square miles)	Percent of basin drainage area	MGD/square mile	MGD
Virginia	4,946	35	0.0284	140
Maryland	2,479	17	.0284	70
West Virginia	3,999	28	.0284	114
Pennsylvania	1,387	10	.0284	39
Total drainage area above Little Falls (near Washington, D.C.)	11,760	100	.0284	334

[1] Washington, D.C., and the Federal Government, Maryland or Virginia could negotiate for other upstream watershed area from Pennsylvania and West Virginia.

TABLE 6.—POTOMAC RIVER BASIN, FLOW ALLOCATION ALTERNATIVES, 1-DAY/20-YEAR LOW FLOW ABOVE WASHINGTON, D.C.

Riparian States	Alternative 1[1] (MGD)	Alternative 2[2] (MGD)	Alternative 3[3] (MGD)
Virginia	222	204	156
Maryland	222	88	62
West Virginia	0	112	142
Pennsylvania	0	53	53
Total at Washington, D.C.	444	444	444

[1] Flow allocated equally.
[2] Flow allocated hydrologically.
[3] Flow allocated by drainage basin area contributing.

208 PLANNING IN THE WASHINGTON METRO AREA

In December 1973, after extensive staff research, the Virginia State Water Control Board recommended that the northern Virginia area be identified and designated as a portion of a Metropolitan Washington Interstate Areawide Water Quality Management Planning Area under Section 208 of Public Law 92-500. On January 8, 1974, Governor Linwood Holton identified the northern Virginia counties of Arlington, Fairfax, Loudoun and Prince William and the included cities as one of six 208 areas within the State of Virginia. He also wrote letters to Mayor Washington of the District of Columbia and Governor Mandel of Maryland, notifying them of his action and urging that they identify the District and adjacent counties in Maryland as part of an interstate area contiguous with northern Virginia. During subsequent months, the Northern Virginia Regional Office of the State Water Control Board worked very closely with the State of Maryland and the District of Columbia to develop the mechanics of management required in this complex interstate cooperative effort, leading to EPA approval of designation in March of 1975. The Commonwealth of Virginia has continued her aggressive efforts to see 208 planning carried to fruition in the Metropolitan Washington Area. The 208 planning in the Metro area is handled by the Council on Governments, an organization of metropolitan area local governments which enter into voluntary compacts in the standard metropolitan areas. The COG studies problems of urban areas, offers recommendations as to possible solutions, and reviews proposals applying for government grants-in-aid.

CONCLUSIONS

Water quality planning and water supply management efforts in Virginia have done much to upgrade the water quality and to protect the water supply of the Potomac River in the Metropolitan Washington Area.

Our conclusions with respect to water pollution control and water supply problems in the Potomac Basin, generally, and the Nation's Capitol area, specifically, are as follows:

1. Virginia now has an excellent water quality control program for point sources of pollution.

2. Virginia now has adequately coordinated efforts to continue control of point sources of pollution.

3. There may not be adequate programs yet to properly control non-point sources of pollution.

4. It is believed that there is general agreement on the technical means to meet water supply needs. There is general agreement on the technical means to meet water supply needs for the Metropolitan Washington Area but current institutional arrangements seem to be difficult.

5. The Metropolitan Area is dependent upon the upper Basin which includes portions of West Virginia, Pennsylvania, Maryland and Virginia, for most of its water supply. The SWCB has historically supported the concept of additional upstream and off-stream as well as the need for the Potomac estuary pump back project.

6. There is a recognized need to develop a mechanism for low-flow allocation and management of reservoir releases, which would protect the water rights of the States and the District of Columbia, but which would also recognize the water needs of the entire community.

7. We believe that more emphasis should be placed on utilizing the existing interstate compact to resolve water issues. Additional compact amendments may be necessary in order to deal adequately with the situation.

8. Take appropriate measures, community wide, to assure that water is not wasted. Encourage community wide review of water use rates to discourage waste, to minimize peak demands and to assure to the extent practical that charges for water service will be adequate to support the construction, operation and maintenance of dam and impoundments, pipelines, monitoring systems and treatment plants.

Mr. HARRIS. Thank you very much.

INTERSTATE COMPACTS

I wonder on your point No. 7 on page 35, "We believe that more emphasis should be placed on utilizing the existing interstate compact to resolve water issues. Additional compact amendments may be necessary in order to deal adequately with the situation."

I wonder if I could ask you to elaborate on that.

Mr. SHIFLET. This is on page 51

Mr. HARRIS. I'm reading point 7 on page 35.

Mr. SHIFLET. Let me see that one. Well, the interstate commission that we have—Incopot—is one that we thought we could use. This is in terms of, "Additional compact amendments may be necessary in order to deal adequately with the situation."

It is felt that perhaps the information that I get, that Incopot probably does not have the full strength it needs to do the job, and yet, perhaps it is the instrument that could be given the strength to do it: in perhaps doing that they could do a great deal more than they are doing now.

So, that was the reason for that statement being put in there.

Mr. HARRIS. Pending currently before the General Assembly is the so-called mini compact between Maryland and Virginia.

Mr. SHIFLET. May I say, it has not been introduced in the General Assembly; it has been before the Interstate Cooperation Commission of the General Assembly, it has not been presented for consideration to the General Assembly.

Mr. HARRIS. Didn't the General Assembly look at it this last time?

Mr. SHIFLET. In 1976? No, sir.

Mr. HARRIS. So, anyway, pending before the commission is the consideration of this, and what recommendations they might make in the general session of the General Assembly is not clear.

Mr. SHIFLET. Yes, sir.

Mr. HARRIS. And at the current time you feel there really is some need for this compact, and that the existing commissions can be utilized?

Mr. SHIFLET. You are speaking now of the regional compact, the mini compact?

Mr. HARRIS. Yes, sir.

Mr. SHIFLET. I would say, sir, from the review that has been made, we have had a considerable amount of concern expressed about it, and I would say that if it were presented today, I would question that it would pass the General Assembly of Virginia. That is assumption on my part from the comments I have heard from some of the members who have reviewed it.

OCCOQUAN TREATMENT PLANT

Mr. HARRIS. May I ask you, you referred to the situation at the Occoquan, how do you view the efforts on the Occoquan? I think you felt it was pretty fundamental and starting to get control.

Mr. SHIFLET. Sir, I may have to yield to Mr. Davis to respond to that specifically. I could say, from all the reports I have had, and the limited involvement I have had with this project, we are very proud of what is taking place there. I personally visited the site about 2 months ago just to take a quick look at it.

Mr. HARRIS. You mean the site at Occoquan?

Mr. SHIFLET. The Occoquan treatment plant. May I ask Mr. Davis to respond to your question?

Mr. HARRIS. Sure.

Mr. DAVIS. Sir, would you repeat the question, please?

Mr. HARRIS. Well, basically what I am asking, how important you feel the Occoquan situation is as far as the water supply area is concerned, and how well it is moving along.

Mr. DAVIS. Sir, we feel that the Occoquan project is very important to protect the water supply for some half million people in northern Virginia. The board has supported this project for the last 4 to 5 years, and has given it priority as far as funds are concerned.

At the present time two contracts have been awarded, the last contract has been bid. It is my understanding that today part "B", which is the document the municipalities have to submit to the EPA to request for water, the last contract on the treatment plant, is being submitted to the water control board, and will be forwarded probably to the EPA next week for the last contract on the plant itself.

Mr. HARRIS. Is the project funded at this point?

Mr. DAVIS. Yes, sir, it is totally funded.

Mr. HARRIS. What is the total cost of it?

Mr. DAVIS. It is approaching $80 million, sir.

Mr. HARRIS. I have a figure of $84 million in my head.

Mr. DAVIS. I am not sure of the exact figure.

Mr. HARRIS. And the total amount is available?

Mr. DAVIS. Yes, sir. It was my understanding yesterday in talking to one of the individuals of my staff who had conversations with the executive director, that with the opening of the bids on the last phase of the plant, that there were several lines in the grant application

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Mr. GUDE. Has EPA pushed you to consider land treatment, did they discuss it with you; what type of interaction do you have with them as far as alternative systems?

Mr. SHUFFLER. I will ask Mr. Davis if he would like to comment on that.

Mr. DAVIS. Sir, in any grant request for a sewage treatment plant, land disposal has to be addressed as one of the alternatives for disposal of sewage today. We have not had any recommendations come out of those facilities for land disposal; but it is something that is being discussed in the various proposed sewage systems.

Mr. GUDE. Do you have any systems that are utilizing land treatment under construction, or in operation?

Mr. RYAN. Yes, Congressman, in the Occoquan watershed there are, I believe, two privately owned sewage systems that do utilize land disposal. They are being closely monitored by the water control board staff to see how they perform.

Mr. GUDE. How large are they?

Mr. RYAN. They are a million gallons per day in size. They are pilot projects and are being monitored to see what experience can be generated prior to authorization of further projects.

Mr. GUDE. Does the Virginia Health Department have any problems with land disposal systems?

Mr. RYAN. They are very interested in that matter and are observing the operation of these plants very closely.

Mr. GUDE. We were pointing out some of the problems in the State of Maryland as far as agricultural runoff was concerned, does Virginia provide for control of sediment pollution from agricultural land?

Mr. RYAN. Congressman, they are. Virginia has since 1973 an erosion and sediment control law similar to the one that Maryland has. The localities have moved forward, almost without exception, in the northern Virginia area in adopting local control ordinances. Agricultural land is excepted from the provisions of those ordinances.

Mr. GUDE. Do you have any idea of the amount of sediment pollution you are getting from agricultural lands?

Mr. RYAN. I don't believe we have the figures at our disposal today; the Conservation Commission of the State of Virginia would have that, sir.

Mr. SHUFFLER. I don't believe we have concrete figures for that. We had a meeting last week with a group in the Tidewater area, and I asked that we make every effort we could to stop sedimentation, agricultural lands washing the silt down in the harbor, which we then have to spend a great deal of money to dredge out.

The technicians told me afterward that all of that silt is not from agricultural land, much of it is generated in the Tidewater area itself, and that we are not getting near as much silt in our rivers from actual agricultural erosion as we think we are. So, right now I am a little bit in a state of uncertainty as to what the situation is in Virginia, Congressman.

Mr. GUDE. Well, did you hear the figures I gave for Maryland, 50 percent of the land that is classified as speculative by the Soil Conservation Service is a problem and needs to be remedied in their con-

sideration. This is not based on looking at the sediment in the river and wondering where it comes from, this is from actual examination of the land and determining that it is a problem.

You are not certain that you have that problem.

Mr. SHIFLETT. I cannot say that we do not have it, but I cannot tell you the magnitude of it.

Mr. HARRIS. Mr. Shiflet and colleagues, I want to thank you very much for your testimony here. It is possible that we may be submitting additional questions to you, and we would ask you to respond in writing.

Mr. SHIFLETT. Please do, sir.

[Subsequently, additional material was received from Mr. Shiflet.]

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE GOVERNOR,
Richmond, Va., July 21, 1977.

Hon. HERBERT E. HARRIS II,
Chairman, Subcommittee on the Bicentennial, the Environment and the International Community, Longworth House Office Building, Washington, D.C.

DEAR CONGRESSMAN HARRIS: In response to your letter of July 13, 1976, I am enclosing some information which I believe adequately addresses the eight questions which you posed. In addition, I am enclosing several documents which provide more detailed information on the subjects addressed.

I hope this material will be useful to the Committee. If I can be of further assistance, please do not hesitate to call me.

Sincerely,

EARL J. SHIFLETT.

Enclosures.

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POTOMAC RIVER BASIN WATER QUALITY MANAGEMENT RESPONSES OF SECRETARY OF COMMERCE AND RESOURCES COMMONWEALTH OF VIRGINIA

Question 1. A bilateral Potomac River Fisheries Commission was established by Maryland and Virginia in 1958 to better manage the fish and shellfish resources of the Potomac. We have heard testimony that considerable degradation has already occurred in the estuary.

Yet there seems to be no joint State or Federal program monitoring the impacts of upstream pollution on the estuary. Why is this the case, and isn't this a glaring deficiency that should be corrected? What is the State's position on the need for a more comprehensive monitoring program in the Potomac estuary?

Answer. We agree that there is a need for a stronger water quality monitoring program in the Potomac River Estuary. Such a program should incorporate biological and sediment monitoring as well as the more conventional water quality parameters. The Board has cooperated with the State of Maryland through the Potomac Monitoring Committee established by the Interstate Commission on the Potomac River Basin, recognizing that the river proper lies wholly in Maryland. (The boundary between the two States is fixed at the low-water mark on the Virginia side of the river.)

The Interstate Commission on the Potomac River Basin has requested substantial financial assistance from the Environmental Protection Agency for the establishment of such a monitoring program. The Commission has recently been informed that $58,000 in additional funds will be made available for this purpose; however, the other portion of the Commission's proposal has been rejected. We believe that such a monitoring program becomes particularly important as massive investment in the sewerage facilities in the Washington Metropolitan Area is completed.

Question 2. You state that existing coordination in the Metro Area is insufficient to develop and implement solutions consistent with the magnitude and complexity of water supply and water quality needs (p. 8). How do you propose to change this situation?

Answer. Virginia's Governors, Holton and Godwin, have both supported the establishment of a water quality management planning organization in the Washington Metropolitan Area, as provided for by Section 208 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500). The com-

munities making up the Washington Metropolitan Area have joined together to form such an organization, they have received a substantial grant award from the United States Environmental Protection Agency, and they are currently well into an analysis of the problem. We believe that this process should be given every opportunity to work.

We would also hope for greater attention by the Federal Government to the Interstate Commission on the Potomac River Basin. For example, Federal Commissioner positions have, in the past, remained vacant for several years at a time. Also, the President's budget for fiscal year 1977 proposed no funds for the Interstate Commission, although increases were proposed for the other river basin commissions. The Congress has restored the funding as a result of appeals from the Basin States.

Question 3. How actively is Virginia pursuing land treatment alternatives to sewage treatment? Wouldn't a pro-land treatment policy be consistent with your expressed desire to protect fish resources in the Potomac and elsewhere in the State as well as other river uses? Have any municipalities in Virginia submitted a grant to EPA for a land treatment facility? Please specify. What is the Health Department's official policy on land treatment?

Answer. The State Water Control Board does not regard the land treatment of sewage as a panacea, but encourages municipalities and their consulting engineers to examine land treatment as an alternative treatment method. All projects recommended for construction grants under P.L. 92-500 are required to consider land treatment of sewage as an alternative, but to date no systems have been recommended as a cost-effective solution. Generally, land cost, community objections, and unfavorable soil and climate conditions have worked against large land treatment systems. The Board has had considerable success with smaller waste management systems and currently has approved 450 no-discharge permits, mostly agricultural. Two small land treatment systems are located in the Occoquan drainage area. The Board recognized these two systems as pilot projects when it adopted a spray irrigation policy for the Occoquan Basin in 1971.

The Health Department and the Board are jointly developing minimum construction standards for sewerage systems. These standards include requirements applicable to land treatment systems.

Two communities, Boones Mill and Standardsville, have proposed sewerage systems based on land application. The Boones Mill project ($220,000) has reached the construction application stage whereas Standardsville is still in the preliminary design stage. A copy of a fact sheet on the Boones Mill project is attached.

Question 4. You note that major industrial discharges in the Virginia portion of the Basin are doing a good job in reducing their pollution. Does this accolade extend to the control of heavy metals and other toxics? What about chemicals from agricultural use?

Answer. The statement with respect to treatment of industrial wastes is based upon data obtained through the State administration of the National Pollutant Discharge Elimination System and on water quality data from 227 monitoring stations. A detailed discussion of water quality in the Virginia portion of the Basin is included in the Board's 1976 Water Quality Inventory to the Environmental Protection Agency and the Congress (copy enclosed—see pages 67–112). The water quality data does not indicate high levels of nutrients in the Shenandoah Valley streams; however, there is a recognized problem in the Occoquan Watershed.

The Board made a detailed State-wide study of pesticides in 1971 and concluded that the problem was not of great significance except in a few relatively isolated areas; including the Opequon Basin in Frederick County, Virginia. The Board has conducted a detailed study of pesticide use in the Opequon Basin, a Virginia tributary to the Potomac. A copy of the Board's report is attached. That study indicated widespread, low-level presence of pesticides, but emphasized that monitoring should be directed towards fish and sediments rather than the water mass. As of July 1, 1976 the Board has begun a pesticide monitoring program in which 100 stations are being sampled semi-annually. In addition, the Board is updating the 1971 pesticide study which was performed for the Department of Agriculture and Commerce. Data from the Board's water quality monitoring program does not indicate a significant problem with heavy metals in Potomac Basin waters. Problems with zinc were encountered several years ago at Front Royal but this problem has been resolved.

Question 5. What is the current Virginia policy with regard to the inter-basin [illegible] of water?

Answer. Virginia has no statutes regarding allocation of surface water and observes common law riparian doctrine. A copy of a statement as presented by the Chairman of the State Water Control Board at a recent Interstate Commission on the Potomac River Basin sponsored meeting on water law is attached. Virginia does not have a specific policy with respect to interbasin transfer of water; however, there are numerous examples of interbasin transfer throughout the State.

Question 6. What is Virginia's position on H.R. 12215—particularly the low flow agreement?

Answer. Virginia recognizes the need for a mechanism which would provide for an equitable allocation of flows, including low flows, of the Potomac River in the Washington Metropolitan Area. As a result of actions taken by the Interstate Commission on the Potomac River Basin on July 15, 1976, attorneys representing the States, the District of Columbia and the Corps of Engineers will attempt to develop a recommended revision which would be mutually acceptable. Virginia has not participated in the drafting of the proposed low flow agreement, but is prepared to work with Maryland, *et al* in developing an agreement which will be effective and which will also protect Virginia's historic rights to use of Potomac River flows.

Question 7. You recommend that more emphasis be placed on the existing interstate compact (ICPRB) to resolve water issues and that amendments to that compact may be necessary.

Could you amplify this statement with specific details of amendments you would favor?

Answer. The Interstate Commission on the Potomac River Basin has, for almost thirty years, provided a continuing forum in which the States and the Federal Government have been able to examine, evaluate and address water resource management problems of the Basin. We are not prepared to offer specific amendments to the Compact at this time, but would instead urge that signatories, including the Government of the United States, identify those present and foreseeable water resource needs which are not now being met and that the ability of the Commission to meet these needs then be examined.

We urge that the Federal government examine the effectiveness of its own participation in the Commission, and that it reexamine its posture of limited financial support in view of the unique relationship between the river and the National Capital area. The Federal Government has made hundreds of millions of dollars available to basin communities for construction of sewerage facilities, flood protection, parks and scenic highway systems. It would seem reasonable that the same government should be prepared to make a reasonable financial contribution to the Commission to help assure that these investments will, collectively, be used effectively to reach public goals as they relate to water and land resources throughout the Potomac River Basin.

The Interstate Commission on the Potomac River Basin's capabilities have, in the past, been limited by at least three factors:

1. A very limited staff and very limited resources. For many years, the Commission had only one or two professional employees and could do little more than publish occasional newsletters.

2. The relationship between Governors of the respective states and their appointees to the Commission may not be clear and the State Commissioners may not have understood how best to develop and implement a water resource policy for the Basin. It would seem advantageous for this relationship to be spelled out, and if possible, for the several Governors, or designated policy-making representatives of the Governors, to participate personally in an annual or biennial meeting of the Commission. Similarly, the relationship between the Federal Commissioners, The President, the Committees of Congress and the multitudinous Federal agencies interested in the Potomac has never been clear, and there is considerable evidence to suggest that the Commission is a poor, and perhaps unwanted, stepchild of the Federal establishment. The recent annual report of the Council on Environmental Quality, for example, omitted the Interstate Commission from its discussion of river basin commissions.

3. The relationship of the Interstate Commission and the Water Resources Council should be clarified. The Commission antidates the Council and the laws establishing the other river basin commissions by many years; however, it does not receive financial support from the Council and does not participate in the Council's deliberations. We believe that it would be advantageous to seek an amendment to Public Law 89-80, the Water Resources Planning Act to recognize the Interstate Commission. We would also suggest that one of the Federal Com-

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OMNIBUS WATER RESOURCES DEVELOPMENT ACT OF 1976

HEARINGS

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES

OF THE

COMMITTEE ON PUBLIC WORKS

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

PENDING WATER RESOURCES LEGISLATION AND OTHER RELATED MATTERS

APRIL 26, 1976—TULSA, OKLAHOMA
MAY 6, 10, 11; JUNE 14, 15, 21, 23, 25, 30; AUGUST 3, 4, AND 5, 1976—WASHINGTON, D.C.

SERIAL NO. 94–H38

Printed for the use of the Committee on Public Works

U.S. GOVERNMENT PRINTING OFFICE
78-618 WASHINGTON : 1976

S641-33

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Senator GRAVEL. I have a vote, and we will recess and then take up other witnesses.

[Brief recess.]

POTOMAC RIVER

Senator GRAVEL. The hearing will come back to order. And we have Mr. Bourassa.

That is an unusual name. That is my mother's maiden name. It is a French name.

STATEMENT OF J. LEO BOURASSA, CHAIRMAN, VIRGINIA STATE WATER CONTROL BOARD

Mr. BOURASSA. It's a small world.

I will make this as brief as I can.

Good evening, Mr. Chairman, and distinguished committee members. I am Leo Bourassa, chairman of the Virginia State Water Control Board of the Commonwealth of Virginia. The State Water Control Board is the water resources agency for the Commonwealth.

The Virginia State Water Control Board has been authorized by the general assembly to speak and act for the State in all matters directly related to conservation or use of the State's water resources.

The board is also authorized to appear and testify for the State before any committee of the U.S. Congress with respect to such matters. Today, I am speaking on behalf of the State Water Control Board and the Commonwealth of Virginia.

I thank you for holding hearings on this important facet of the critical water supply problem in the Washington area. We are hopeful that as a result of these hearings some positive action will be brought about to allow the Washington Suburban Sanitary Commission to proceed with construction of their needed weir rights on the Potomac River.

About 35 percent of the Potomac River watershed above the Washington metropolitan area lies in Virginia, and contributed about 45 percent of the flow in the river at Washington. The Virginia communities in the Washington metropolitan area have made, to date, only limited water supply demands on the main stem of the Potomac.

Some of the residents of Arlington and Fairfax Counties, and Federal facilities located there, are supplied by the Corps of Engineers, Washington aqueduct system. As growth continues in the Virginia communities, however, we believe it reasonable to assume that Virginia will place greater demands upon the Potomac as a source of water supply. For example, the Fairfax County Water Authority foresees the need for up to 200 million gallons per day from the Potomac by the turn of the century.

This is not the only area. We have the same problems in other parts of the State.

Virginia has always placed a great deal of attention on water quality and supply in the Potomac River basin. Virginia's willingness to cooperate with Maryland and the District of Columbia on water supply matters is evidenced by the general assembly passage in 1970 of the Potomac River basin compact. Virginia was very active in the Washington area interstate water resources program, and has given great emphasis to seeing that waste treatment plants in the basin are provided and properly operated.

S. 3326 appears to be a simple bill to authorize the Washington Suburban Sanitary Commission to construct a water diversion structure on the Potomac River. The bill states that the structure to be authorized by the Corps of Engineers may not be constructed until a written agreement has been executed which provides for enforceable schedule for the allocation and withdrawal of water by any affected entity during periods of low flow.

The agreement must allocate an undefined low flow in the stretch of the Potomac River between the Little Falls dam and the farthest upstream limit of the pool of water behind the Seneca dam. While this seems like an innocuous bill, it has a number of important policy implications for Virginia.

The State Water Control Board at its June 29, 1976 board meeting, adopted a policy opposing the passage of H.R. 12215, S. 3326, as then drafted. The position of the Board, acting under its statutory authority, was "to oppose S. 3326, a bill, which if enacted, might deprive Virginia of its riparian rights to the waters of the Potomac River as guaranteed by the 1785 compact between Virginia and Maryland, and the arbitration award of 1877, which was approved by the Congress of the United States."

The Board's action on S. 3326 was based on the fact that Virginia's ancient water rights in the Potomac are not recognized by the bill. An item in the 1877 award of arbitrators, who were charged with settling boundary disputes between Maryland and Virginia, clearly states that "Virginia is entitled not only to full dominion over the soil to the low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeable to the Compact of 1785." Code of Virginia, 7.1, section 7.1–7 of chapter 1, appendix A, which is attached to this document.

Further, S. 3326 provides only for participation in the agreement negotiation process by the United States of America, the State of Maryland and its political subdivisions—the Washington Suburban Sanitary Commission and the city of Rockville.

The bill does not provide for participation by the State of Virginia or any of her political subdivisions. The Board recognizes the need for agreements in the Washington metropolitan area which would permit a just, equitable allocation of Potomac River flows, and stands ready and willing to help develop the details of such proper agreements. We must, however, be mindful of the precedents that might be set in the solution of any immediate problems.

Virginia is prepared to support a revised bill that would require that Virginia be a party to the allocation agreement. The agreement must cover the allocation of the natural low flow, the allocation of stored water released from federally financed projects such as Bloomington and Verona, and the allocation of reused water from the estuary.

The agreement must also include, one, an equitable system to cover payment of the non-Federal costs for such projects; and, two, a just system requiring reimbursement for the water used in excess of the agreed upon allocation. It would be our intent that these provisions apply evenly to all parties to the agreement and that no political juris-

diction should be able to benefit at the expense of another political jurisdiction.

We in Virginia are certainly interested in the speedy adoption of a bill that will allow the Washington Suburban Sanitary Commission to begin their construction program, but we are convinced that Virginia must have a fair and just allocation agreement that properly recognizes her water rights.

We are convinced that we can negotiate swiftly such an agreement with all of the concerned parties. Such a negotiation process would be far better than waiting for the allocation to be settled in the courts.

I can assume the committee that the State Water Control Board will give the highest priority to the negotiation of a suitable agreement with our Potomac neighbors.

I would like to call your attention to appendix B—which is attached to this document—which is our suggestion for a revised bill.

Again, I express my thanks to you for giving us the time to be heard and trust that you will act on the bill in a manner beneficial to all parties.

Senator GRAVEL. Thank you very much.

Mr. BOURASSA. Thank you, sir.

If you have questions, we will be happy to answer them.

Senator GRAVEL. Thank you.

[Appendixes to Mr. Bourassa's statement follow:]

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Appendix A

CODE OF VIRGINIA

Title 7.1.

Boundaries, Jurisdiction and Emblems of the Commonwealth.

CHAPTER 1.

Boundaries and Compacts With Adjoining States.

§ 7.1-7. Compact and boundary between Virginia and Maryland. — Commissioners appointed by the General Assembly of the State of Maryland, and also of the State of Virginia, having met at Mount Vernon, in Virginia, on the twenty-eighth day of March, in the year seventeen hundred and eighty-five, and mutually agreed to a compact; the said compact having been confirmed, first by the General Assembly of Maryland, and afterwards, on the third day of January, seventeen hundred and eighty-six, by an act of the General Assembly of Virginia: It is hereby declared that the said compact remains obligatory, except so far as it may have been superseded by the provisions of the Constitution since formed for the United States; and it shall be faithfully observed and kept by this government and all its citizens, so far as may not be incompatible with the said Constitution. Amongst the articles of the said compact are the following:

"Seventh, The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states: Provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other;

"Eighth, All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states;

"Tenth, All piracies, crimes, or offenses committed in that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's point) to Watkin's point, near the mouth of Pocomoke river, may be doubtful, and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two states upon the said river is doubtful, by any persons not citizens of the Commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the State of Maryland, which hath legal cognizance of such offense. And all piracies, crimes, or offenses committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons, not citizens of Maryland, against any citizens of Virginia, shall be tried in the court of the Commonwealth of Virginia, which hath legal cognizance of such offense. All piracies, crimes, and offenses committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the Commonwealth of Virginia, having legal cognizance of such offenses. And all piracies, crimes, and offenses committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the Commonwealth of Virginia, or of the State of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack, shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offenses committed by persons not citizens of either state,

upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the state where the offense shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offense shall have been committed, and also in the state where the said offender may reside; and execution may be issued by the court or magistrate giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court or magistrate of the state where such offender may reside, having jurisdiction within the state or county where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment, in the same manner, and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited.

"Eleventh, Any vessel, entering into any port of the river Potowmack, may be libelled or attached for debt by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board may be seized by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice in a civil or criminal case, or shall attempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the State of Virginia may be served on any part of the said rivers, upon any person, or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the State of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside."

The General Assembly of the State of Virginia, and the General Assembly of the State of Maryland, having appointed the Hon. Jeremiah S. Black, of Pennsylvania, the Hon. James B. Beck, of Kentucky, and the Hon. Charles A. Jenkins, of Georgia, arbitrators to settle and determine the true line of boundary between the states of Virginia and Maryland, and a majority of said arbitrators having ascertained and determined the said true line of boundary, and having, on January sixteenth, eighteen hundred and seventy-seven, made an award as to the same in words following, to wit: "January sixteenth, Anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the states of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said states, and examined the proofs on both sides, do find, declare, award, ascertain, and determine that the true line of boundary between the said states, so far as they are coterminous with one another, is as follows, to wit:

"Beginning at the point on the Potomac river where the line between Virginia and West Virginia strikes the said river at low-water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's point, at or near the mouth of the Potomac, in the latitude thirty-seven degrees, fifty-three minutes, eight seconds, and longitude seventy-six degrees, thirteen minutes, forty-six seconds; thence crossing the waters of the Chesapeake bay, by a line running north sixty-five degrees, thirty minutes east, about nine and a half nautical miles, to a point on the western shore of Smith's island, at the north end of Sassafras hammock, in latitude thirty-seven degrees, fifty-seven minutes, thirteen seconds, longitude seventy-six degrees, two minutes, fifty-two seconds; thence across Smith's island, south,

eighty-eight degrees, thirty minutes east, five thousand six hundred and twenty yards to the centre of Horse hammock, on the eastern shore of Smith's island, in latitude thirty-seven degrees, fifty-seven minutes, eight seconds, longitude seventy-five degrees, fifty-nine minutes, twenty seconds; thence south seventy-nine degrees, thirty minutes east, four thousand eight hundred and eighty yards, to a point marked 'A' on the accompanying map, in the middle of Tangier sound, in latitude thirty-seven degrees, fifty-six minutes, forty-two seconds, longitude seventy-five degrees, fifty-six minutes, twenty-three seconds, said point bearing from Jane's island light, south, fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees, thirty minutes, west four thousand seven hundred and forty yards, by a line dividing the waters of Tangier sound to a point where it intersects the straight line from Smith's point to Watkins' point, said point of intersection being in latitude thirty-seven degrees, fifty-four minutes, twenty-one seconds; longitude seventy-five degrees, fifty-six minutes, fifty-five seconds, bearing from Jane's island light south, twenty-nine degrees west, and from Horse hammock, south, thirty-four degrees, thirty minutes east; this point of intersection is marked 'B' on the accompanying map; thence north eighty-five degrees, fifteen minutes, east, six thousand seven hundred and twenty yards along the line above mentioned, which runs from Smith's point to Watkins' point until it reaches the latter spot, namely, Watkins' point, which is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, fifty-two minutes, forty-four seconds; from Watkins' point the boundary line runs due east seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke sound, which is marked 'C' on the accompanying map, and is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, forty-seven minutes, fifty seconds; thence by a line dividing the waters of Pocomoke sound, north forty-seven degrees, thirty minutes, east five thousand two hundred and twenty yards, to a point in said sound marked 'D' on the accompanying map, in latitude thirty-seven degrees, fifty-six minutes, twenty-five seconds, longitude seventy-five degrees, forty-five minutes, twenty-six seconds; thence following the middle of the Pocomoke river by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eight, eighteen hundred and sixty-eight, at a point in the middle of Pocomoke river, and in the latitude thirty-seven degrees, fifty-nine minutes, thirty-seven seconds, longitude seventy-five degrees, thirty-seven minutes, four seconds; thence by the Scarborough and Calvert line, which runs five degrees, fifteen minutes north of east, to the Atlantic ocean; the latitudes, longitudes, courses, and distances here given have been measured upon the Coast Chart, number thirty-three, of the United States coast survey, (sheet number three, Chesapeake bay,) which is herewith filed as part of this award, and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five, between Smith's point and Watkins' point; in further explanation of this award, the arbitrators deem it proper to add that:

"First, The measurements being taken and places fixed according to the coast survey, we have come as near to a perfect mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line, or in the latitude or longitude of a place, the natural objects called for must govern;

"Second, The middle thread of Pocomoke river is equidistant as nearly as may be, between the two shores, without considering arms, inlets, creeks, or affluents as parts of the river, but measuring the shore lines from headland to headland;

"Third, The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule; that is to say, from low-water mark at one headland to low-water at another, without following indentations, bays, creeks, inlets, or affluent rivers;

"Fourth, Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full

enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five: In testimony whereof we have hereunto set our hands the day and year aforesaid.

"J. S. Black, of Pennsylvania,
"Charles J. Jenkins, of Georgia."

And the General Assembly of Virginia, having approved and confirmed the award by the act of March the fourteenth, eighteen hundred and seventy-eight, and the act having declared that so soon as such award is also approved, accepted, confirmed, and ratified by the General Assembly of the State of Maryland, and by the Congress of the United States, thereupon, and immediately thereafter, the award and survey, matter and thing therein contained, shall be obligatory on the State and the citizens thereof, and should be forever faithfully and inviolably observed and kept by the State and all its citizens according to the true intent and meaning of the same; and the award and survey, matter and thing therein contained, having been so approved, accepted, confirmed and ratified by the General Assembly of the State of Maryland and by the Congress of the United States: It is hereby declared that the award and survey, matter and thing therein contained, are obligatory on this State and the citizens thereof, and shall be forever observed and kept by the State and all of its citizens according to the true intent and meaning of the same, and to that end the faith of the State stands pledged.

The documents in relation to the boundary between the states of Maryland and Virginia, which were obtained under the resolution adopted by the General Assembly of Virginia, on the twentieth day of March, eighteen hundred and thirty-two, and the report relative to the boundary, referred to in the subsequent resolution of the twenty-first of February, eighteen hundred and thirty-five, and the award with the map and other papers accompanying the same, made under the act of March twenty-eight, eighteen hundred and seventy-four, and the act of February tenth, eighteen hundred and seventy-six, amendatory thereof, and approved and confirmed by the act of March fourteenth, eighteen hundred and seventy-eight, shall be preserved in the executive department as contemplated by the resolutions, and by the last-mentioned act. (Code 1950, § 7-6; 1966, c. 102.)

APPENDIX 6

A BILL

To authorize an allocation agreement for the waters of the Potomac River; and to authorize the construction of a water diversion structure on the Potomac River, Maryland, subject to execution of an agreement providing for equitable allocation of available water during the low flow periods of the Potomac River.

Be in enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the states of Maryland and Virginia are hereby authorized to enter into an agreement providing for an equitable allocation of water available for use from the Potomac River.

SEC. 2. That for the purposes of section 9 of the Act of March 3, 1899 (30 Stat. 1151, 33 U.S. C. 401), the consent of Congress is granted to the Washington Suburban Sanitary Commission to construct a water diversion structure, approximately 945 feet in length, in the Potomac River between the Washington Suburban Sanitary Commission's water filtration plant and Watkins Island, except that the structure authorized by this section may not be constructed until the Department of the Army (acting through the Corps of Engineers), the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitary Commission, and such other governmental authorities as the Department of the Army, the State of Maryland, the Commonwealth of Virginia and the District of Columbia deem desirable signatories, have entered into a written agreement. That agreement shall provide for: (a) an enforceable schedule for the allocation and withdrawal

of water by any entity during periods of low flow from that portion of the Potomac River located between the Little Falls Dam and the farthest upstream limit of the pool of water behind the Seneca Dam; (b) the allocation of reused water from the estuary; (c) the allocation of stored water released from federally financed projects; (d) an equitable system to cover payment of the non-federal costs for such projects; and, (e) a just system requiring reimbursement of funds for water used in excess of agreed-upon allocation.

SEC. 3. The Secretary of the Army (acting through the Chief of Engineers) is authorized to enter into the agreements specified in the first and second sections of this Act.

SEC. 4. Except as provided for in the agreements specified in the first and second sections, this Act shall not change existing authority to appropriate the waters of the Potomac River in any way.

BEST AVAILABLE COPY

L-239

WATER RESOURCES DEVELOPMENT—1976

(94-68)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

AUGUST 24, 25, 26, 31; SEPTEMBER 1, 2, 8, 9, 1976

Printed for the use of the
Committee on Public Works and Transportation

U.S. GOVERNMENT PRINTING OFFICE
78-903 WASHINGTON : 1977

H641-17

Whereas, it is the sense of the Commission that H.R. 12215 and S. 3326 as introduced on March 2 and April 26, respectively, can be improved to provide an entirely satisfactory vehicle for the accomplishment of the stated purpose, and

Whereas, it would be most desirable for the present Congress to act on H.R. 12215 and S. 3326: Therefore be it

Resolved, That the Chairman of the Interstate Commission on the Potomac River Basin, or at his option a member of the Commission, or its Executive Director, be authorized to testify on H.R. 12215 and S. 3326, and to incorporate the following concepts in his testimony:

1) that Congress recognize the need for the affected States, i.e., Maryland and Virginia, and the District of Columbia to enter into an arrangement whereby agreement may be reached on the low flow allocation of the waters of the Potomac River in the Washington Metropolitan Area,

2) that any such agreement protects all rights of the affected states, the District of Columbia and the United States Government,

3) that the potential role of the Interstate Commission on the Potomac River Basin in the management of the low flow agreement be recognized, and

4) that the riparian rights of West Virginia and Pennsylvania be protected.

Mr. ROBERTS. The subcommittee will stand in recess.

[Whereupon, at 12:07 p.m., the subcommittee was recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

[Whereupon, at 2:15 p.m., the subcommittee reconvened, Hon. Ray Roberts presiding.]

Mr. ROBERTS. Mr. Jensen, would you make whatever statement you desire?

TESTIMONY OF EUGENE JENSEN, EXECUTIVE SECRETARY, WATER CONTROL BOARD, STATE OF VIRGINIA

Mr. JENSEN. Mr. Chairman, I am Eugene Jensen. I am executive secretary for the Virginia Water Control Board.

I do have a prepared statement which has been distributed. I would appreciate having it made a part of the record if I might extend my remarks.

Mr. ROBERTS. It will be made a part of the record. You may summarize in any way you see fit.

[The statement referred to follows:]

STATEMENT OF EUGENE T. JENSEN, EXECUTIVE SECRETARY, VIRGINIA STATE WATER CONTROL BOARD

Good morning Mr. Chairman and distinguished committee members. I am Eugene T. Jensen, executive secretary of the Virginia State Water Control Board of the Commonwealth of Virginia. The State water control board is the water resources agency for the Commonwealth. The board consists of seven individuals appointed by the Governor.

The Virginia State Water Control Board has been authorized by the general assembly to speak and act for the State in all matters directly related to conservation or use of the State's water resources. The board is also authorized to appear and testify for the State before any committee of the United States Congress with respect to such matters. Today I am speaking on behalf of the State water control board and the Commonwealth of Virginia.

I thank you for holding hearings on this important facet of the critical water supply problem in the Washington area. We are hopeful that as a result of these hearings some positive action will be brought about to allow the

Washington Suburban Sanitary Commission to proceed with construction of their needed water rights in the Potomac River.

About 35 percent of the Potomac River watershed above the Washington metropolitan area lies in Virginia, and contributes about 45 percent of the flow in the river at Washington. The Virginia communities in the Washington metropolitan area have made to date only limited water supply demands on the main stem of the Potomac. Some of the residents of Arlington and Fairfax Counties, and Federal facilities located there, are supplied by the Corps of Engineers Washington Aqueduct System. As growth continues in the Virginia communities, however, we believe it reasonable to assume that Virginia will place greater demands upon the Potomac as a source of water supply. For example, the Fairfax County Water Authority foresees the need for up to 200 million gallons per day from the Potomac by the turn of the century.

Virginia has always placed a great deal of attention on water quality and supply in the Potomac River Basin. Virginia's willingness to cooperate with Maryland and the District of Columbia on water supply matters is evidenced by the general assembly passage in 1970 of the Potomac River Basin Compact. Virginia was very active in the Washington area interstate water resources program and has given great emphasis to seeing that waste treatment plants in the basin are provided and properly operated.

H.R. 12215 appears to be a simple bill to authorize the Washington Suburban Sanitary Commission to construct a water diversion structure on the Potomac River. The bill states that the structure to be authorized by the Corps of Engineers may not be constructed until a written agreement has been executed which provides for an enforceable schedule for the allocation and withdrawal of water by any affected entity during periods of low flow. The agreement must allocate an undefined low flow in the stretch of the Potomac River between the Little Falls Dam and the farthest upstream limit of the pool of water behind Seneca Dam. *While this seems like an innocuous bill, it has a number of important policy implications for Virginia.*

The State Water Control Board (SWCB) at its June 29, 1976 board meeting adopted a policy opposing passage of H.R. 12215 as then drafted. The position of the board, acting under its statutory authority was "to oppose H.R. 12215, a bill, which if enacted, might deprive Virginia of its riparian rights to the waters of the Potomac River as guaranteed by the 1785 compact between Virginia and Maryland and the arbitration award of 1877 which was approved by the Congress of the United States."

The board's action on H.R. 12215 was based on the fact that Virginia's ancient water rights in the Potomac are not recognized by the bill. An item in the 1877 award of arbitrators, who were charged with settling boundary disputes between Maryland and Virginia, clearly states that "*Virginia is entitled not only to full dominion over the soil to the low water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland agreeably to the compact of seventeen hundred and eighty-five.*" (Code of Virginia, 7.1, Section 7.1–7 of Chapter 1) Appendix A. Further, H.R. 12215 provides only for participation in the agreement negotiation process by the United States of America, the State of Maryland and its political subdivisions (the Washington Suburban Sanitary Commission and the city of Rockville). The bill does not provide for participation by the State of Virginia or any of her political subdivisions.

The board recognizes the need for agreements in the Washington metropolitan area which would permit a just, equitable allocation of Potomac River flows, and stands ready and willing to help develop the details of such proper agreements. We must, however, be mindful of the precedents that might be set in the solution of any immediate problems.

Virginia is prepared to support a revised bill that would require that Virginia be a party to the allocation agreement. The agreement must cover the allocation of the natural low flow, the allocation of stored water released from federally financed projects such as Bloomington and Verona, and the allocation of reused water from the estuary. The agreement must also include (1) an equitable system to cover payment of the non-Federal costs for such projects, and (2) a just system requiring reimbursement for the water used

in excess of the agreed upon allocation. It would be our intent that these provisions apply evenly to *all* parties to the agreement and that no political jurisdiction should be able to benefit at the expense of another political jurisdiction.

We in Virginia are certainly interested in the speedy adoption of a bill that will allow the Washington Suburban Sanitary Commission to begin their construction program, but we are convinced that Virginia must have a fair and just allocation agreement that properly recognizes her water rights. We are convinced that we can negotiate swiftly such an agreement with all of the concerned parties. Such a negotiation process would be far better than waiting for the allocation to be settled in the courts. *I can assure the committee that the State water control board will give the highest priority to the negotiation of a suitable agreement with our Potomac neighbors.* I would like to call your attention to Appendix B, which is our suggestion for a revised bill.

Again, I express my thanks to you for giving us the time to be heard and trust that you will act on the bill in a manner beneficial to all parties.

APPENDIX A

CODE OF VIRGINIA

(Title 7.1 Boundaries, Jurisdiction and Emblems of the Commonwealth)

Chapter 1

BOUNDARIES AND COMPACTS WITH ADJOINING STATES

§ 7.1-7. Compact and boundary between Virginia and Maryland.—Commissioners appointed by the General Assembly of the State of Maryland, and also of the State of Virginia, having met at Mount Vernon, in Virginia, on the twenty-eighth day of March, in the year seventeen hundred and eighty-five, and mutually agreed to a compact; the said compact having been confirmed, first by the General Assembly of Maryland, and afterwards, on the third day of January, seventeen hundred and eighty-six, by an act of the General Assembly of Virginia: It is hereby declared that the said compact remains obligatory, except so far as it may have been superseded by the provisions of the Constitution since formed for the United States; and it shall be faithfully observed and kept by this government and all its citizens, so far as may not be incompatible with the said Constitution. Amongst the articles of the said compact are the following:

"Seventh, The citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states: Provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other;

"Eighth. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potowmach, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states;

"Tenth, All piracies, crimes, or offenses committed in that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's point) to Watkin's point, near the mouth of Pocomoke river, may be doubtful, and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two states upon the said river is doubtful, by any persons not citizens of the Commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the State of

Maryland, which legal cognizance of such offense. And all piracies, crimes, or offenses committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons, not citizens of Maryland, against any citizens of Virginia, shall be tried in the court of the Commonwealth of Virginia, which hath legal cognizance of such offense. All piracies, crimes, and offenses committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the Commonwealth of Virginia, having legal cognizance of such offenses. And all piracies, crimes, and offenses committed on the said parts of Chesapeake bay and Pocomoke river, by any citizen of the Commonwealth of Virginia, or of the State of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack, shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offenses committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the state where the offense shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offense shall have been committed, and also in the state where the said offender may reside; and execution may be issued by the court or magistrate giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court or magistrate of the state where such offender may reside, having jurisdiction within the state or country where the offender may reside, in cases of a similar nature, such court or magistrate shall order execution to issue upon such authenticated judgment, in the same manner, and to the same extent, as if the judgment had been given by the court or magistrate to which such transcript shall be exhibited.

"Eleventh. Any vessel, entering into any port of the river Potowmack, may be libelled or attached for debt by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board may be seized by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice in a civil or criminal case, or shall attempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the State of Virginia may be served on any part of the said rivers, upon any person, or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the State of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the other, upon a summons from any court or magistrate, having jurisdiction, being served by a proper officer of the country where such citizen shall reside."

The General Assembly of the State of Virginia, and the General Assembly of the State of Maryland, having appointed the Hon. Jeremiah S. Black, of Pennsylvania, the Hon. James B. Beck, of Kentucky, and the Hon. Charles A. Jenkins, of Georgia, arbitrators to settle and determine the true line of boundary between the states of Virginia and Maryland, and a majority of said arbitrators having ascertained and determined the said true line of boundary, and having, on January sixteenth, eighteen hundred and seventy-seven, made an award as to the same in words following, to wit: "January

sixteenth, Anno Domini, eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the states of Virginia and Maryland, by acts of their respective legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of the said states, and examined the proofs on both sides, do find, declare, award, ascertain, and determine that the true line of boundary between the said states, so far as they are coterminous with one another, is as follows, to wit:

"Beginning at the point on the Potomac river where the line between Virginia and West Virginia strikes the said river at low-water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's point, at or near the mouth of the Potomac, in the latitude thirty-seven degrees, fifty-three minutes, eight seconds, and longitude seventy-six degrees, thirteen minutes, forty-six seconds; thence crossing the waters of the Chesapeake bay, by a line running north sixty-five degrees, thirty minutes east, about nine and a half nautical miles, to a point on the western shore of Smith's island, at the north end of Sassafras hammock, in latitude thirty-seven degrees, fifty-seven minutes, thirteen seconds, longitude seventy-six degrees, two minutes, fifty-two seconds: thence across Smith's island, south, eighty-eight degrees, thirty minutes, east, five thousand six hundred and twenty yards to the centre of Horse hammock, on the eastern shore of Smith's island, in latitude thirty-seven degrees, fifty-seven minutes, eight seconds, longitude seventy-five degrees, fifty-nine minutes, twenty seconds; thence south seventy-nine degrees, thirty minutes east, four thousand eight hundred and eighty yards, to a point marked 'A' on the accompanying map, in the middle of Tangier sound, in latitude thirty-seven degrees, fifty-six minutes, forty-two seconds, longitude seventy-five degrees, fifty-six minutes, twenty-three seconds, said point bearing from Jane's island light, south, fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees, thirty minutes, west four thousand seven hundred and forty yards, by a line dividing the waters of Tangier sound to a point where it intersects the straight line from Smith's point to Watkin's point, said point of intersection being in latitude thirty-seven degrees, fifty-four minutes, twenty-one seconds; longitude seventy-five degrees, fifty-six minutes, fifty-five seconds, bearing from Jane's island light south, twenty-nine degrees west, and from Horse hammock, south, thirty-four degrees, thirty minutes east; this point of intersection is marked 'B' on the accompanying map; thence north eighty-five degrees, fifteen minutes, east, six thousand seven hundred and twenty yards along the line above mentioned, which runs from Smith's point to Watkins' point until it reaches the latter spot, namely, Watkins' point, which is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, fifty-two minutes, forty-four seconds; from Watkins' point the boundary line runs due east seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke sound, which is marked 'C' on the accompanying map, and is in latitude thirty-seven degrees, fifty-four minutes, thirty-eight seconds, longitude seventy-five degrees, forty-seven minutes, fifty seconds; thence by a line dividing the waters of Pocomoke sound, north forty-seven degrees, thirty minutes, east five thousand two hundred and twenty yards, to a point in said sound marked 'D' on the accompanying map, in latitude thirty-seven degrees, fifty-six minutes, twenty-five seconds, longitude seventy-five degrees, forty-five minutes, twenty-six seconds; thence following the middle of the Pocomoke river by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eight, eighteen hundred and sixty-eight, at a point in the middle of Pocomoke river, and in the latitude thirty-seven degrees, fifty-nine minutes, thirty-seven seconds, longitude seventy-five degrees, thirty-seven minutes, four seconds; thence by the Scarborough and Calvert line, which runs five degrees, fifteen minutes north of east, to the Atlantic ocean; the latitudes, longitudes, courses, and distances here given have been measured upon the Coast Chart, number thirty-three, of the United States coast survey, (sheet number three, Chesapeake bay,) which is herewith filed as part of this award, and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen

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hundred and eighty-five, between Smith's point and Watkins' point; in further explanation of this award, the arbitrators deem it proper to add that:

"First, The measurements being taken and places fixed according to the coast survey, we have come as near to a perfect mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line, or in the latitude or longitude of a place, the natural objects called for must govern;

"Second, The middle thread of Pocomoke river is equidistant as nearly as may be, between the two shores, without considering arms, inlets, creeks, or affluents as parts of the river, but measuring the shore lines from headland to headland;

"Third, The low-water mark on the Potomac, to which Virginia has a right in the soil, is to be measured by the same rule; that is to say, from low-water mark at one headland to low-water at another, without following indentations, bays, creeks, inlets, or affluent rivers;

"Fourth, Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five: In testimony whereof we have hereunto set our hands the day and year aforesaid.

"J. S. Black, of Pennsylvania,
"Charles J. Jenkins, of Georgia."

And the General Assembly of Virginia, having approved and confirmed the award by the act of March the fourteenth, eighteen hundred and seventy-eight, and the act having declared that so soon as such award is also approved, accepted, confirmed, and ratified by the General Assembly of the State of Maryland, and by the Congress of the United States, thereupon, and immediately thereafter, the award and survey, matter and thing therein contained, shall be obligatory on the State and the citizens thereof, and should be forever faithfully and inviolably observed and kept by the State and all its citizens according to the true intent and meaning of the same; and the award and survey, matter and thing therein contained, having been so approved, accepted, confirmed and ratified by the General Assembly of the State of Maryland and by the Congress of the United States: It is hereby declared that the award and survey, matter and thing therein contained, are obligatory on this State and the citizens thereof, and shall be forever observed and kept by the State and all of its citizens according to the true intent and meaning of the same, and to that end the faith of the State stands pledged.

The documents in relation to the boundary between the states of Maryland and Virginia, which were obtained under the resolution adopted by the General Assembly of Virginia, on the twentieth day of March, eighteen hundred and thirty-two, and the report relative to the boundary, referred to in the subsequent resolution of the twenty-first of February, eighteen hundred and thirty-five, and the award with the map and other papers accompanying the same, made under the act of March twenty-eight, eighteen hundred and seventy-four, and the act of February tenth, eighteen hundred and seventy-six, amendatory thereof, and approved and confirmed by the act of March fourteenth, eighteen hundred and seventy-eight, shall be preserved in the executive department as contemplated by the resolutions, and by the last-mentioned act. (Code 1950, § 7-8; 1966, c. 102.)

APPENDIX B

A BILL To authorize an allocation agreement for the waters of the Potomac River; and to authorize the construction of a water diversion structure on the Potomac River, Maryland, subject to execution of an agreement providing for equitable allocation of available water during the low flow periods of the Potomac River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the states of Maryland and Virginia are hereby authorized to enter into an agreement providing for an equitable allocation of water available for use from the Potomac River.

SEC. 2. That for the purposes of section 9 of the Act of March 3, 1899 (30 Stat. 1151, 33 U.S.C. 401), the consent of Congress is granted to the Washington Surburban Sanitary Commission to construct a water diversion structure, approximately 945 feet in length, in the Potomac River between the Washington Suburban Sanitary Commission's water filtration plant and Watkins Island, except that the structure authorized by this section may not be constructed until the Department of the Army (acting through the Corps of Engineers), the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitary Commission, and such other governmental authorities as the Department of the Army, the State of Maryland, the Commonwealth of Virginia and the District of Columbia deem desirable signatories, have entered into a written agreement. That agreement shall provide for: (a) an enforceable schedule for the allocation and withdrawal of water by any entity during periods of low flow from that portion of the Potomac River located between the Little Falls Dam and the farthest upstream limit of the pool of water behind the Seneca Dam; (b) the allocation of reused water from the estuary; (c) the allocation of stored water released from federally financed projects; (d) an equitable system to cover payment of the non-federal costs for such projects; and, (e) a just system requiring reimbursement of funds for water used in excess of agreed-upon allocation.

SEC. 3. The Secretary of the Army (acting through the Chief of Engineers) is authorized to enter into the agreements specified in the first and second sections of this Act.

SEC. 4. Except as provided for in the agreements specified in the first and second sections, this Act shall not change existing authority to appropriate the waters of the Potomac River in any way.

Mr. JENSEN. The Virginia Water Control Board did testify before the Senate. They recommended against passage, reporting out of the bill as it was then drafted.

Congressman Gude, of course, has since made some changes in it.

We believe those are changes in the right direction. We have not had a chance to discuss them with our attorneys. I have not had a chance to discuss them with the citizen board. The board does recognize the need for the legislation that the Congressman has proposed. We recognize the technical need for the weir.

The board, I believe, is prepared to give the highest priority to working with Maryland, with the Maryland subdivision to try to come up with a bill which we could endorse, and which we could recommend that you would report out.

I have discussed this with my chairman within the last day. He has assured me that they do not wish to delay the passage of the bill; that we would like to find a solution which we could be assured would protect Virginia's water rights in the Potomac River.

I think if we can reach him, if we could make the necessary arrangements for the principals to get together on this, that we would be prepared to come back to the subcommittee in probably a week or 10 days with something that we could agree to jointly.

Mr. ROBERTS. Thank you so very much.

Does the gentleman from Illinois have any questions?

Mr. FARY. No questions.

Mr. ROBERTS. Mr. Jensen, Thank you very much. We appreciate it.

Off the record.

[Discussion off the record.]

Mr. ROBERTS. We have permission to proceed, so it is my pleasure to present our lovely colleague, Lindy Boggs.

It is nice to have you.

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COMMONWEALTH of VIRGINIA

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VIRGINIA'S POSITION ON THE POTOMAC RIVER LOW-FLOW ALLOCATION AGREEMENT

Virginia urges that the Corps of Engineers give consideration to all of the users of the Potomac River, recognize Virginia's riparian rights in the Potomac, and in the interest of fairness to all, not take a narrow view of its responsibility only to the Washington Aqueduct system in these negotiations for a Potomac Low-Flow Allocation Agreement.

Virginia wishes to go on record opposing the Corps of Engineers' proposals of May 19, 1977, and of July 14, 1977, suggesting a low flow allocation of Potomac River water based on 1976-1977 winter withdrawal rates and urges that the Corps cease in delaying the efforts of the Fairfax County Water Authority and of the Washington Suburban Sanitary Commission to proceed with their water withdrawal projects. Virginians feel that Corps officials were approaching

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Statement of Virginia State Water Control Board, 2111 North Hamilton Street, Richmond, Virginia presented at September 13, 1977, Public Hearing, Falls Church, Virginia.

Presentation made by T. M. Schwarberg, Jr., Director, Northern Regional Office, Alexandria, Virginia.

blackmail when they announced that until the Corps attached a signature to the Potomac Low-Flow Allocation Agreement, no water intake construction permit for Fairfax County Water Authority would be issued, and that if Virginia was willing to relinquish her riparian rights to the Potomac River, the Corps would have no objection to the existing December 6, 1976, Agreement.

While the Corps has long been Congressionally mandated to provide the District of Columbia with a potable water supply, they have not been granted the authority to impede or deny the surrounding jurisdictions their just right to Potomac water use. The Corps inspired delay, by not accepting the December 6, 1976, Potomac Low-Flow Allocation Agreement, approved by Maryland, Virginia and the Washington Suburban Sanitary Commission lends more and more credence to surfacing suspicions that the Corps has broader, more grandiose, selfish designs pertaining to the future control and use of the Potomac River. An almost inflexible, inherently inequitable, unreasonable, and unconscionable Corps' position, if allowed to perpetuate, will seriously impede and retard the future welfare of the Region as a whole and force the surrounding jurisdictions to bear completely unjust economic and physical hardships.

Virginia urges the Corps to stop playing their very dangerous delaying game using numerous excuses which vary from the need to complete studies and reports to the concern over having representation for many water users signing the Low-Flow Agreement, and instead, to sign the December 6, 1976, Low-Flow Allocation Agreement in which the Corps played a lead role in drafting.

The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by Compact and expects those rights to be honored. Virginia

has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions. It is felt that nothing in the December 6, 1976, Agreement is deemed to in any way affect riparian rights to the Potomac River except as explicitly provided.

The SWCB at its September 9-10, 1977, Board Meeting recommended to the Virginia State Water Study Commission that it consider the advisability of asking the General Assembly to promptly enact a permit system to cover withdrawals of water from the Potomac River by citizens and jurisdictions of Virginia, and also asked the Attorney General's Office to prepare a memorandum on Virginia's rights to the waters of the Potomac River and the legal options available to protect those rights.

The letter of July 26, 1977, from J. Leo Bourassa, Vice Chairman, Virginia State Water Control Board to G. K. Withers, Baltimore Corps of Engineers, is to be made part of this testimony.

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DISTRICT OF COLUMBIA WATER SUPPLY

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

OCTOBER 10, 1979

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
77-166 O WASHINGTON: 1981

SHIN-415

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Senator MATHIAS. Our next witness is Mr. Thomas M. Schwarberg, the northern regional director of the Virginia State Water Control Board.

TESTIMONY OF THOMAS M. SCHWARBERG, NORTHERN REGIONAL DIRECTOR, VIRGINIA STATE WATER CONTROL BOARD

Mr. SCHWARBERG. Thank you, Mr. Chairman.

Thank you for the opportunity to appear here today on behalf of the Commonwealth to comment.

Senator MATHIAS. Without objection, your written statement will be included in the record at the conclusion of your testimony.

Mr. SCHWARBERG. As you know, the Commonwealth is very concerned about the water supply potential in certain areas of the State. Population growth has created an ever-increasing burden on the presently available water supply.

The State general assembly expressed this concern when it passed House Joint Resolution 236 during the 1977 session. This resolution established a statewide water study commission made up of 9 members—now 12—appointed by the Governor and the general assembly to investigate the potential water supply shortages throughout the State, especially in northern and southeastern Virginia.

The water study commission concluded that a potential for water supply shortages in the near future in northern Virginia did exist, as was dramatically demonstrated during the summer of 1977 when the commission was preparing its study.

The commission stated that the best way to address the problem would be: one, to improve the management of existing reservoirs in northern Virginia with augmentation from the Potomac or Shenandoah Rivers and possible construction of new local reservoirs; two, to reduce water consumption by amending the plumbing codes and adopting new pricing schemes; three, to construct the Fairfax County Water Authority Potomac Intake; four, to affirm the Commonwealth's riparian rights to use Potomac River water through legal action as necessary; five, to establish local jurisdictional cooperation to manage regional water supplies during water shortage emergencies; six, to raise the height of the Occoquan Dam to provide additional storage at minimal cost; seven, to explore the avilability of ground water in northern Virginia and on the western slopes of the Blue Ridge; eight, to construct finished water interconnections between adjacent utilities to serve as backup supplies during emergencies; and, nine, to utilize existing reservoirs, quarries, and other storage facilities to augment available water supplies.

I am pleased to report that since the commission report was submitted in December 1977, every one of the recommendations has either been implemented or is seriously being considered for implementation. The Shenandoah and Potomac River interconnections with the Occoquan Reservoir have been studied in detail by the Corps of Engineers.

The general assembly allowed local jurisdictions to amend their building codes to require water saving devices. The Fairfax County Water Authority continues to utilize pricing mechanisms to encourage water conservation, and the Corps of Engineers has assumed water

conservation as a factor in all of the alternatives presented in its water supply report.

The Potomac Low Flow Allocation Agreement was signed by the affected parties in January 1978 and paved the way for the Fairfax County Water Authority to construct its much-needed intake in the Potomac River which is now anticipated to be completed in the summer of 1981.

Virginia's riparian rights to the reasonable use of the Potomac River had been partially addressed by the low flow allocation agreement and are being further pursued in the Virginia Senate.

A water supply emergency agreement has been developed by Washington metropolitan jurisdictions through the Council of Governments. The agreement establishes procedures for identifying the various degrees of water shortage severities, broadcasting areawide alerts, and implementing specified water conservation measures for each level of severity. It is expected that this agreement may be signed by the jurisdictions before the end of the year.

The Fairfax County Water Authority is taking steps to raise the height of the Occaquan Dam by 2 feet which will increase reservoir storage by 1.1 billion gallons. The authority is also, in conjunction with the U.S. Geological Survey, engaged in a study of potential development of local ground water supplies in northern Virginia.

The Northern Virginia Water Cooperative Association composed of water purveyors in northern Virginia, has been formed for the purpose of improving water supply efficiency and reliability through interjurisdictional cooperation, water supply, and distribution.

An emergency water sharing agreement has been drafted for northern Virginia jurisdictions, and the signing ceremony should take place later this month.

Finally, the Fairfax County Water Authority is seriously considering examining the possible purchase of an excavated quarry to be used for containing filter backwash water and for additional water storage.

As you can see, much has been accomplished in the last 2 years. The report by the Congressional Research Service does not seem to fairly reflect the progress which has been made. In fact, on page 1 of the summary, it states that, "To date, little remedial action has been taken." We do not feel that this is the case.

However, we do agree with the report's observation that interjurisdictional cooperation through formalized agreements will be critical toward implementing any long-range solutions to the water supply problems in the Washington area.

For that reason, we wholeheartedly support the efforts of the NVPDC, the council of governments, and the Interstate Commission on the Potomac River Basin in establishing regional cooperation. The possibility of utilizing article III of the basin compact as a mechanism for formalizing and facilitating regional cooperation is worthy of further consideration, as recommended.

We are pleased that the draft results of the Corps of Engineers Water Supply Study for the Washington metropolitan area are now available. We commend the corps for its responsiveness to local concerns as reflected in the options and for its well-orchestrated public participation program.

I am not prepared today to make any official comments for the Commonwealth with respect to the corps' study, as the water study commission has not yet had the opportunity to review the document.

Our staff has prepared a more detailed list of comments on the CRS report, which I have provided to you with this testimony.

This concludes my statement. Thank you.

Senator MATHIAS. Thank you very much, Mr. Schwarberg.

Do you have any idea when you will be prepared to comment on the report?

Mr. SCHWARBERG. We are establishing a meeting date toward the middle of this month with the commission to discuss the review of the document, and I would assume that by early in December we should have the comments to you.

Senator MATHIAS. Would you be kind enough to advise this subcommittee of whatever conclusions you reach?

Mr. SCHWARBERG. Of course.

Senator MATHIAS. May I ask you the question I have asked other witnesses as to your specific suggestions regarding the article III section under the compact?

Mr. SCHWARBERG. The Commonwealth has always viewed the interstate commission as very necessary in the continuing effort to have regional cooperation. The commission is a very good forum and is one way we can periodically meet to discuss the differences and work out solutions. We look upon a possible formation of this endeavor under article III as a chance to really make some progress on how we can accurately forecast what might be happening in the basin.

I do not think the authority element in objecting to the article III potential as far as giving the interstate commission more management authority in the basin is really of concern. The interstate commission has always been willing to assist the States and to disseminate information. I think the proposed efforts of this new section should help all of us because, if we expect to have regional cooperation, we must have reasonable and accurate data to implement the cooperation.

Senator MATHIAS. Thank you very much, Mr. Schwarberg.

We will look forward to your further advice.

Mr. SCHWARBERG. You are welcome.

[The prepared statement of Mr. Schwarberg with attachments follows:]

WATER MANAGEMENT IN THE WASHINGTON AREA

Testimony of the Commonwealth of Virginia to be presented at a Hearing of the Senate Subcommittee on Governmental Efficiency and the District of Columbia on October 10, 1979

Senator Mathias and Subcommittee members: I thank you for the opportunity to appear on behalf of the Commonwealth of Virginia to comment on water supply management and planning in the Washington metropolitan area. As you know, the Commonwealth is very concerned about the potential for water supply deficits in certain areas of the State where population growth has placed an ever-increasing burden on presently-available water supplies. The State General Assembly expressed this concern when it passed House Joint Resolution 236 during the 1977 session. HJR 236 established a state-wide Water Study Commission, made up of nine members appointed by the Governor and the General Assembly to investigate the potential of water supply shortages throughout the state, especially in Northern and Southeastern Virginia. The Commission reported back to the General Assembly on December 1, 1977 with recommendations on how the identified water supply problems should be addressed. As a result of its investigation, the Water Study Commission concluded that a potential for water supply shortages in the near future in Northern Virginia did exist, as was dramatically demonstrated during the summer of 1977 as the Commission was preparing its study. In its report to the General Assembly, the Commission stated that the best way to address the problem would be to: (1) improve the management of existing reservoirs in Northern Virginia with augmentation from the Potomac or Shenandoah rivers, and possible construction of new local reservoirs, (2) reduce water consumption by amending plumbing codes and adopting new pricing schemes, (3) construct the Fairfax County Water Authority Potomac intake, (4) affirm the Commonwealth's riparian rights to use Potomac

River water through legal action as nedessary, (5) establish local jurisdictional cooperation to manage regional water supplies during water shortage emergencies, (6) raise the height of the Occoquan dam to provide additional storage at minimal cost, (7) explore the availability of ground water in Northern Virginia and on the western slope of the Blue Ridge, (8) construct finished-water interconnections between adjacent utilities to serve as back-up supply during emergencies, and (9) utilize existing reservoirs, quarries and other storage facilities to augment available watrr supplies.

I am pleased to report that since the Commission report was submitted in December of 1977, every one of the recommendations has either been implemented or is seriously being considered for implementation.

The Shenandoah and Potomac river interconnections with the Occoquan Reservoir have been studied in detail by the Corps of Engineers and the results have recently been made available to the State and local jurisdictions for their consideration.

The General Assembly, during the 1978 session, passed HB469, which allows local jurisdictions to amend their building codes to require water-saving devices. The Fairfax County Water Authority continues to utilize pricing mechanisms to encourage water conservation, and the Corps of Engineers has assumed water conservation as a factor in all of the alternatives presented in its water supply report.

The Low Flow Allocation Agreement was signed by the affected parties in January, 1978, and paved the way for the Fairfax County Water Authority to construct its much-needed intake on the Potomac River. Construction has begun on the project, with completion anticipated in the summer of 1981.

Virginia's riparian rights to the reasonable use of the Potomac River have been partially addressed by the Low Flow Allocation Agreement, and are being further pursued through Senate Bill 440, which establishes the Potomac River Riparian Rights Act.

A Water Supply Emergency Agreement has been developed by Washington metropolitan jurisdictions through the Council of Governments. The Agreement establishes procedures for identifying various degrees of water shortage severity, broadcasting an areawide alert, and implementing specified water conservation measures for each level of severity. It is expected that this agreement may be signed by the jurisdictions before the end of the year.

The Fairfax County Water Authority is taking steps to raise the height of the Occoquan Dam by two feet, which will increase reservoir storage by 1.1 billion gallons. A committee made up of Fairfax County and Prince William County representatives has been established to review local concerns and assure local approval of the project.

The Fairfax County Water Authority and the U.S. Geological Survey are cooperatively engaged in a study of the potential development of local ground water supplies in Northern Virginia .

A Northern Virginia Water Cooperative Association, composed of water purveyors in Northern Virginia, has been formed for the purpose of improving water supply efficiency and reliability through interjurisdictional cooperation in water supply and distribution. As part of this effort, the Northern Virginia Planning District Commission has prepared a map of regional water distribution systems, to identify possible interconnections. Also, a regional

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Emergency Water-Sharing Agreement has been drafted for Northern Virginia jurisdictions, and a signing ceremony will take place later this month.

Finally, the Fairfax County Water Authority is seriously examining the possible purchase of an excavated quarry to be used for containing filter backwash water and for additional water storage.

As you can see, much has been accomplished in the last two years. The report by the Congressional Research Service does not seem to fairly reflect the progress which has been made. In fact, on page one of the summary, it states that: "To date, little remedial action has been taken." We do not feel that this is the case. However, we do agree with the report's observation that interjurisdictional cooperation through formalized agreements will be critical toward implementing any long-range solutions to the water supply problem in the Washington area. For that reason, we wholeheartedly support the efforts of the Northern Virginia Planning District Commission, Council of Governments and the Interstate Commission on the Potomac River Basin in establishing regional cooperation. The possibility of utilizing Article III of the Basin Compact of 1970 as a mechanism for formalizing and facilitating regional cooperation is worthy of further consideration as recommended in the study.

We are pleased that the draft results of the Corps of Engineers Water Supply Study for the Washington Metropolitan Area are now available. We commend the Corps for its responsiveness to local concerns as reflected in the options presented in the study, and for its well-orchestrated public participation program during study development. I am not prepared today to

make any official comments for the Commonwealth with respect to the Corps study, since the Water Study Commission has not yet had the opportunity to review the document.

Our staff has prepared a more detailed list of comments on the CRS report, which I have provided to you.

This concludes my prepared remarks. I will be happy to answer any questions you may have.

Attachments: Va. SWCB Comments on the CRS Report

Dec., 1977 Report of the State Water Study Commission

Dec., 1978 Report of the State Water Study Commission

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(Copies BWCM
+ Sing Chia
Cover Ltr. to NRO)

DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 1715
BALTIMORE, MARYLAND 21203

NABOP-F

15 December 1977

TO WHOM IT MAY CONCERN:

Printed in the "Draft Environmental Impact Statement Concerning Proposed Potomac River Water Supply Structures" are two versions of the proposed Potomac River Low Flow Allocation Agreement (LFAA), drafts dated 6 December 1976 and 2 November 1977. Another draft LFAA dated 15 December 1977 is inclosed with this letter and is additional information to be included in the draft Environmental Impact Statement. This latest draft LFAA is the result of recent negotiations among the signatories. The 15 December 1977 draft LFAA has not, however, been reviewed and approved by the principals (the Governors of the State of Maryland and the Commonwealth of Virginia, the Mayor of the District of Columbia, and the Secretary of the Army). There yet may be some unresolved issues. Compared to the 2 November 1977 draft LFAA, the 15 December 1977 version (1) includes the right of Virginia (Fairfax County) to withdraw water during low flow, (2) adds the District of Columbia as a signatory, and (3) changes certain moderator provisions.

Sincerely yours,

G. K. WITHERS
Colonel, Corps of Engineers
District Engineer

1 Incl
As stated

VA-SRC-001195

DRAFT

15 December 1977

POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT

THIS AGREEMENT, made and entered into this _____ day of ---------- 197_, by and among the UNITED STATES OF AMERICA (hereinafter called "the Government") acting by the Secretary of the Army through the Chief of Engineers, the STATE OF MARYLAND (hereinafter called "the State") acting by the Secretary of the Department of Natural Resources, the COMMONWEALTH OF VIRGINIA (hereinafter called "the Commonwealth") acting by the Chairman of the State Water Control Board, the DISTRICT OF COLUMBIA (hereinafter called "the District") acting by its Mayor, and the WASHINGTON SURBURBAN SANITARY COMMISSION (hereinafter called "the Commission") acting by its Chairman;

PREFACE

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the primary purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Government situate in the District of Columbia and its environs, and thereafter of providing a public water supply for the inhabitants of the District of Columbia; and

WHEREAS, the Secretary of the Army is authorized, subject to certain conditions, to supply treated water from the Washington Aqueduct to any competent state or local authority in the Washington Metropolitan Area in Virginia, and to that end has entered into agreements with the County of Arlington and the City of Falls Church, Virginia; and

WHEREAS, the sole source of raw water treated by the Washington Aqueduct and dispensed therefrom is the Potomac River, and the Washington Aqueduct is now maintaining intake facilities for this purpose at Little Falls and Great Falls, Maryland; and

WHEREAS, the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the Department of Natural Resources (hereinafter called "the Administration") to appropriate or use the water of the Potomac River; and

WHEREAS, the parties to this Agreement recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made

herein requiring that access by any of them to such water be made subject to the provisions of this Agreement; and

WHEREAS, the Commission is charged with the responsibility of providing a safe and adequate public water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into agreements to provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission maintains a water treatment plant and an intake therefrom on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement, and in addition the Commission maintains a water treatment plant with intake on the Patuxent River, and requires water from both sources in order to fulfill its above-mentioned responsibilities for providing a public water supply; and

WHEREAS, the City of Rockville, Maryland, is operating and maintaining water treatment facilities and a water distribution system and maintains an intake facility about one mile upstream from Great Falls on the Potomac River, which intake is upstream from the Washington Aqueduct

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intakes and within the limits of the River covered by this Agreement; and

WHEREAS, the Fairfax County Water Authority is an authority in the Commonwealth of Virginia proposing to withdraw water from that portion of the Potomac River, which is covered by this Agreement; and

WHEREAS, in the absence of adequate upstream impoundments and associated flow regulation, the quantity of water which may flow in the Potomac River between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland, during periods of low flow in that portion of the River, may be less than the quantity needed to meet the demand for all customary public water supply purposes during such periods; and

WHEREAS, in light of the Federal legislative enactments providing for the Corps of Engineers to supply water to the District of Columbia, enactment of legislation was deemed by the Government to be a prerequisite to its participation in a Potomac River Low Flow Allocation Agreement; and

WHEREAS, the consent of Congress to a Potomac River Low Flow Allocation Agreement is expressly stated in Section 181 of the Water Resources Development Act of 1976, Public Law 94-587;

NOW, THEREFORE, in consideration of the premises and of the public and governmental interests deemed to be served hereby, the parties hereto do mutually agree as follows:

ARTICLE 1. Enforcement.

A. Pertinent Portion of the River. The portion of the Potomac River subject to this Agreement is that located between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland. This portion is hereinafter referred to as "the defined portion" or, alternately "the subject portion" of the Potomac River.

B. Moderator. Authority to enforce the provisions of this Agreement shall be vested in an unbiased Moderator. It shall be the duty of the Moderator and he shall have the authority:

1. To take all actions necessary to enforce the provisions of this Agreement and his decisions hereunder, and for this purpose he may sue in his own name.

2. To decide all disputes between or among the parties arising under this Agreement not disposed of by consent.

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The authority of the Moderator shall not restrict those powers reserved to the parties, including those specified in Article 3, Section C.

C. The decision of the Moderator shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, or not supported by substantial evidence. All parties agree to accept and implement every decision of the Moderator unless and until said decision is overturned by a court of competent jurisdiction.

D. The parties specifically grant to the Moderator the authority to inspect documents, records, meters, facilities, and similar items necessary to decide any question or verify reports made by any party as a consequence of this Agreement. Upon the request of any party, the Moderator shall provide said party any or all of the information held by him relevant to this Agreement.

E. Should the Moderator decide to commence or defend any action or otherwise have need of legal services relating to this Agreement, he shall have the right to contract with counsel for such purpose, and the cost of such services shall be repaid in equal shares by the Government, the State, the Commonwealth, and the District. In the

interest of prompt action, the Moderator may accept legal services, or an advance of funds, for such purpose from any party. Nothing herein shall require a party being sued by the Moderator to advance funds for such purpose.

F. The Moderator shall not be liable for injury or damage resulting from any decision or action taken in good faith without malice under apparent authority of this agreement, even though such decision or action is later judicially declared to be unauthorized or invalid.

G. The Moderator shall be selected, and may be relieved of his duties for any reason, by unanimous action of the Government, the State, the Commonwealth, and the District, expressed in a signed memorandum. Should the office of Moderator become vacant through death, resignation, or otherwise, a new Moderator shall be selected as soon as practicable by such unanimous action. During any period in which the office of Moderator remains vacant through a failure of unanimous action or otherwise, the full functions of the office of Moderator shall be exercised by a Standby Moderator who shall, except as expressly otherwise provided, be treated as the Moderator for all purposes under the provisions hereof. The duty to designate the Standby Moderator shall rotate annually among the Government, the State, the Commonwealth, and the District in the order stated, beginning on the date this agreement becomes

effective and rotating thereafter on the first day of each calendar year. Written notice of such annual designation shall be sent to all other parties by January 15 of each year. The first Moderator for this Agreement is designated in Annex A hereto.

H. Subject to the availability of funds, the reasonable expenses, including legal fees, and compensation of the Moderator shall be paid in equal shares by the Government, the State, the Commonwealth, and the District except as indicated in Section 1E above. Any expense shall be deemed reasonable if at least three of the above four parties so agree or if so determined by a court. If any party accepts as reasonable a particular expense not accepted as reasonable by the other parties, that party may pay that expense, in addition to that party's proportionate share of all other expenses. At the time of each annual review as provided in Article 4 of this agreement, the reviewing parties shall set, by majority vote, the per diem fee to be paid a Moderator in the event his services shall be necessary. A Standby Moderator, who is an employee of the designating party or one of its political subdivisions or agencies, shall serve without fee in exercising the functions of the Moderator.

I. Subject to the provisions of Sections B and C of this Article any party may institute or join in an action

or proceeding for the protection of any right under this agreement or the enforcement of any of its provisions in a court of competent jurisdiction.

J. Each of the parties hereto waives such immunity as it may have to the extent necessary to permit maintenance in a Federal Court of an action by the Moderator or another

ARTICLE 2. Administration.

A. Washington Aqueduct. The Government will provide a communication control center at the Washington Aqueduct for the administration of the allocation plan as provided herein. The Washington Aqueduct Division, U. S. Army Engineer District, Baltimore ("the Aqueduct"), will collect, receive, record and accumulate daily reports regarding the flow of the Potomac River and the quantities of water being withdrawn from the defined portion of the Potomac River, and the quantities of water withdrawn and available from all other sources for use within the Washington Metropolitan Area, by the Government, the Commission, the Commonwealth and the State and the political subdivisions, or authorities hereof, the permittees of the Administration, and by any other water withdrawing entity which may formally be added or made subject to this Agreement subsequent to its initial execution. Subject to the parties' rights of appeal to the Moderator, the parties grant to the Aqueduct, and to each other, the right to inspect documents, records, meters, facilities and similar items

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necessary to decide any question or verify reports made by any party as a consequence of this agreement. Beginning with the Alert Stage, the Aqueduct will keep the Moderator informed as to the stage of flow in the Potomac River, and, during the Restriction and Emergency Stages the fair share allocated to each user, and all information utilized for determining the allocation. The Aqueduct will provide all parties with the same information relating to allocation, the quantities of water being withdrawn by all users from any and all sources, and the flow of the Potomac River. To permit uniformity of reports and to implement the administrative measures specified herein, reports and calculations, by or to the Aqueduct, of daily withdrawals or daily flows, will be based on the twenty-four hour period from one midnight to the following midnight, unless the parties subsequently agree to a different twenty-four hour measuring period. The Aqueduct will calculate the total daily flow by adding the withdrawals during the previous 24 hours at all withdrawal points and the remaining daily flow over the Washington Aqueduct Dam at Little Falls, as determined by the readings recorded on the USGS gage at Little Falls during the preceding twenty-four (24) hours. The average reading will determine the flow over the dam for the previous day.

B. Stages of Flow in the Potomac River. The Aqueduct will determine from the information accumulated when the

following stages exist in the defined portion of the Potomac River.

1. Alert Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than fifty percent (50%) of the total daily flow, but less than 80%, the Aqueduct will declare an "Alert Stage" to be in effect.

2. Restriction Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than eighty percent (80%) of the total daily flow, the Aqueduct will declare a "Restriction Stage" to be in effect and the Aqueduct will request the U. S. Park Service to discontinue putting Potomac River water into the C&O Canal.

3. Emergency Stage. When the estimated total daily withdrawal for any day within the ensuing five (5) days from the subject portion of the Potomac River is expected to exceed the daily river flow anticipated, the Aqueduct will declare an "Emergency Stage" to be in effect.

C. Allocation of Flow. Whenever the Restriction Stage or the Emergency Stage is in effect, the Aqueduct shall daily calculate and advise each user (as defined herein), and the Moderator, of each user's allocated fair share of the water available from the subject portion of the Potomac

River in accordance with this Section C. In calculating the amount of water available for allocation, the Aqueduct will determine, in consultation with the parties and based upon then current conditions and information, any amount needed for flow in the Potomac River downstream from the Little Falls dam for the purpose of maintaining environmental conditions ("environmental flow-by"), and shall balance such need against essential human industrial and domestic requirements for water. The Aqueduct's determinations shall be based upon the data and shall give substantial weight to conclusions for the environmental flowby submitted by the State.

1. For the purposes of this Section C, the term "users" refers to the following entities which are or may be appropriating water for public water supply purposes from the subject portion of the Potomac River; namely, the Government (including its water customers), the Commonwealth for and on behalf of herself and each of her political subdivisions and authorities, the State and the Administration (for and on behalf of its permittees whether or not parties to this Agreement) the District of Columbia, the Commission, and such entities which may formally be added or made subject to this Agreement subsequent to its initial execution.

2. Each user shall report to the Aqueduct (and to each other) the number of gallons of processed water pumped daily

to all its customers from all sources during each winter period (the months of December through February), commencing with the winter period 1977-78. The amounts pumped during the 5 most recent winter periods which have elapsed as of the time of allocation, or less than 5 if fewer have so elapsed, shall be combined for the purpose of computing each user's average daily winter use, except that, in the case of a user becoming subject to this Agreement subsequent to its initial execution, the average daily winter use of such user shall be the average of the amounts of water pumped during all of the winter periods, commencing December 1 of the year immediately prior to its first withdrawal from the subject portion of the river, which have elapsed as of the time of allocation, but not exceeding the 5 most recent winter periods. The ratio which the average daily winter use of each user bears to the average daily winter use of all users will be applied to the daily amount of water available at the time of allocation from the subject portion of the Potomac River (after deduction for environmental flow-by) and all other sources as specified in Paragraph 5 below (calculated at maximum capacity practicable). The resulting amount, less the amount then available to said user by use of the maximum capacity practicable from all such other sources, will be such user's allocated fair share of the flow of the Potomac River.

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3. a. The formula set forth in Article 2.C.2. shall continue in effect unless changed by unanimous consent of the original signatory parties or as set forth below. After January 1, 1988, any of the original signatory parties which desires to change the allocation formula shall give written notice to all other such parties. Within 60 days thereafter, such parties shall meet for the purpose of negotiating a replacement formula. In the event that no such replacement formula is agreed on within one year after receipt of the aforesaid notice, the allocation ratio which would have been in effect for the summer of the year in which the notice was given shall be used as an interim allocation ratio for the withdrawal of water during subsequent periods of low flow until such time as the original signatory parties agree upon a replacement formula. Any party, at any time after the expiration of one year from the receipt of such notice and after the exhaustion of such administrative procedures as may be applicable to it as a permittee for water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it may have to a greater share of water than set by the interim allocation ratio, provided that all parties shall adhere to the interim allocation ratio until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be

received and processed at all times, except that the provisions for recalculating the interim allocation ratio as set forth in Sec. E of Article 3 shall apply only to new users.

b. Any formula negotiated pursuant to subparagraph (a) hereof shall allocate water on a fair and equitable basis and shall take into consideration, among other things, (a) steps taken by parties which can do so to minimize dependence upon the Potomac River during periods of low flow, (b) the nature and effectiveness of water conservation methods put into effect (c) steps taken to increase the water supply available for the Washington Metropolitan Area, (d) then current population growth and planning for future growth, (e) feasibility and availability of new sources of water, and (f) technological advances in water treatment and water quality measurement.

4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct for reallocation.

5. The water subject to the allocation formula under the terms of this Agreement includes the maximum capacity practicable from Patuxent and Occoquan as it exists in each case on December 1, 1977 and both the natural flow and the

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augmented flow from existing upstream reservoirs, in addition to Bloomington, of the subject portion of the Potomac River. Any other augmentation to flow, reservoir storage, or treating capacity developed by a user after December 1, 1977, shall not be made subject to the allocation formula, but those users who incur, or participate in the payment of, the expenditures for such augmentation may agree as to how it is to be divided and shall file a copy of said agreement with the other parties. In recognition that the sole source of water supply for the District of Columbia is the Potomac River, each other party will offer the District an opportunity to participate in a portion of any additional augmentation for use during the Restriction and Emergency stages on reasonable terms, unless such party shows that it is infeasible to do so.

6. In the event a disaster, such as a major fire or water main break, results in an abnormal loss of a significant portion of any user's allocation for a particular period, the Aqueduct shall determine suitable adjustments in allocation of the available flow for or during the emergency period created by the disaster only.

7. Water from the emergency pumping station having its intake at the estuary of the Potomac shall not be considered as water available from other sources for the purposes of

Section 2.C.2. or otherwise included in computations made under this agreement except to the extent that such water is actually used by a user.

ARTICLE 3. Obligations of the Parties.

A. The Government agrees to cause the Aqueduct as the operating agency to perform the functions and requirements which are required of the Government and the Aqueduct in this Agreement, including the furnishing of information to the other parties relating to the Aqueduct's water withdrawal and use, the same as required by other parties to be furnished to the Aqueduct under Subparagraphs B and D, of this Article. These functions and responsibilities of the Aqueduct shall be carried out under the supervision of the District Engineer, U.S. Army Engineer District, Baltimore, or his designee, who shall be responsible for making the determinations required in the discharge of these responsibilities.

B. The Commission, the State (including the Administration), the District, and the Commonwealth agree to provide the Aqueduct with all the information relating to the withdrawal and use by them, their permittees, entities reporting through them and their political subdivisions, as applicable, of the waters of the subject portion of the Potomac River and availability from other sources which is needed for the administration of the allocation system.

C. The State agrees that all appropriation permits granted by the Administration for any appropriation of water from the subject portion of the Potomac River shall include a provision subjecting the permittee to the provisions of this Agreement. Nothing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River; or the authority of the Government with respect to navigable waters, including the regulation of commerce among the states and with foreign nations.

D. The parties will comply with the determinations made by the Aqueduct pursuant to this Agreement, unless and until overturned pursuant to the terms of Article 1.

E. Communities or entities which appropriate water from the defined portion of the Potomac River, as permittees of the State, shall either become parties to this Agreement or the State will cause the Administration to include the low flow allocation formula and such other operating provisions of this Agreement in the permits as necessary to effect its purposes. Any community or entity, not a party to this Agreement or subject to its provisions, may apply to the Government and

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the State for permits granting access to the withdrawal of water, notwithstanding the pendency of negotiations or the imposition of an interim allocation ratio pursuant to Section 2.C.3. If the necessary permits are granted, the existing interim allocation ratio shall be recalculated based on winter period use for the year immediately prior to the first withdrawal from the subject portion of the river by the new user. The average daily winter use of the new user for such winter period and those of the other users employed in determining the interim allocation ratio shall be employed to compute a revised interim allocation ratio which shall remain in effect until a replacement formula is determined pursuant to Section 2.C.3.

F. This Agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages.

ARTICLE 4. Review

In the month of April in each year during the term of this Agreement the original signatory parties shall convene for the purpose of reviewing the provisions of this Agreement

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and considering any modifications thereof, and make such modifications as they agree upon. Upon agreement among the original signatory parties, review and modifications as might be agreed upon can occur at any time and not be necessarily limited to the annual, April, considerationn.

ARTICLE 5. Revocation.

The parties stipulate that this Agreement has been made as a condition of obtaining the consent of the United States Congress for construction of a water diversion structure by the Commission from the north shore of the Potomac River at the Commission's water filtration plant to the north shore of Watkins Island. Accordingly, this Agreement shall not be revoked without the unanimous consent of the Government, the State, the Commonwealth and the District.

ARTICLE 6. Effective Date.

This Agreement shall become binding when: (1) it is executed by the original signatory parties hereto, namely, the Government, the State, the Commonwealth, the District, and the Commission, and (2) a Moderator has been selected as provided in Article 1.G, and (3) the Government issues one or more permits for the construction of any water diversion structure or water intake in the subject portion of the Potomac River to any party hereto or political subdivision or authority thereof, and (4) all acts have been taken by each of the parties hereto

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necessary to make this agreement binding and enforceable with respect to each of them, including, if necessary, ratification by the legislatures of the signatory states. Notice that all such necessary acts have been taken by each of the parties shall be delivered to the other parties along with the opinion of its respective counsel or attorney general that the acts taken are sufficient to cause this agreement to become effective, binding and enforceable under the laws or charter of such parties. The parties will, however, commence to record and maintain the consumption figures and other base data called for under the foregoing provisions of this Agreement, at the time they execute this Agreement.

ARTICLE 7. Severability.

The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of the agreement is declared to be unconstitutional or the applicability thereof to any party is held invalid, the remainder of such agreement shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written, except as a different date of execution may be noted following any party's signature.

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ATTEST:

THE UNITED STATES OF AMERICA

_____ BY _____

THE STATE OF MARYLAND

_____ BY _____

(official title)

THE COMMONWEALTH OF VIRGINIA

_____ BY _____

(official title)

THE DISTRICT OF COLUMBIA

_____ BY _____

(official title)

THE WASHINGTON SUBURBAN SANITARY COMMISSION

_____ BY _____

(official title)

VA-SRC-001217

L-285

11 January 1978

POTOMAC RIVER LOW FLOW ALLOCATION AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of January 1978, by and among the UNITED STATES OF AMERICA (hereinafter called "the Government") acting by the Secretary of the Army through the Chief of Engineers, the STATE OF MARYLAND (hereinafter called "the State") acting by the Governor and the Secretary of the Department of Natural Resources, the COMMONWEALTH OF VIRGINIA (hereinafter called "the Commonwealth") acting by the Governor and the Chairman of the State Water Control Board; the DISTRICT OF COLUMBIA (hereinafter called "the District") acting by its Mayor, the WASHINGTON SURBURBAN SANITARY COMMISSION (hereinafter called "the Commission") acting by its Chairman; and the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called "the Authority") acting by its Chairman;

PREFACE

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the primary purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Government situate in the District of Columbia and its environs, and thereafter of

providing a public water supply for the inhabitants of the District of Columbia; and

WHEREAS, the Secretary of the Army is authorized, subject to certain conditions, to supply treated water from the Washington Aqueduct to any competent state or local authority in the Washington Metropolitan Area in Virginia, and to that end has entered into agreements with the County of Arlington and the City of Falls Church, Virginia; and

WHEREAS, the sole source of raw water treated by the Washington Aqueduct and dispensed therefrom is the Potomac River, and the Washington Aqueduct is now maintaining intake facilities for this purpose at Little Falls and Great Falls, Maryland; and

WHEREAS, the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the State's Department of Natural Resources (hereinafter called "the Administration") to appropriate or use the water of the Potomac River; and

WHEREAS, the parties to this Agreement recognize that other riparian interests, such as communities located in Virginia, may in the future desire to withdraw and use water from the segment of the Potomac River which is the subject of the within Agreement, and provision is made

herein requiring that access by any of them to such water be made subject to the provisions of this Agreement; and

WHEREAS, the Commission is charged with the responsibility of providing a safe and adequate public water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into agreements to provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission maintains a water treatment plant and an intake therefrom on the Potomac River, which intake is upstream from the Washington Aqueduct intakes and within the limits of the River covered by this Agreement, and in addition the Commission maintains a water treatment plant with intake on the Patuxent River, and requires water from both sources in order to fulfill its above-mentioned responsibilities for providing a public water supply; and

WHEREAS, the City of Rockville, Maryland, is operating and maintaining water treatment facilities and a water distribution system and maintains an intake facility about one mile upstream from Great Falls on the Potomac River, which intake is upstream from the Washington Aqueduct

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intakes and within the limits of the River covered by this Agreement; and

WHEREAS, the Fairfax County Water Authority is an authority in the Commonwealth of Virginia proposing, to withdraw water from that portion of the Potomac River which is covered by this Agreement and has applied for a permit to construct a water intake structure for such purpose; and

WHEREAS, in the absence of adequate upstream impoundments and associated flow regulation, the quantity of water which may flow in the Potomac River between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland, during periods of low flow in that portion of the River, may be less than the quantity needed to meet the demand for all customary public water supply purposes during such periods; and

WHEREAS, in light of the Federal legislative enactments providing for the Corps of Engineers to supply water to the District of Columbia, enactment of legislation was deemed by the Government to be a prerequisite to its participation in a Potomac River Low Flow Allocation Agreement; and

WHEREAS, the consent of Congress to a Potomac River Low Flow Allocation Agreement is expressly stated in Section 181 of the Water Resources Development Act of 1976, Public Law 94-587; and

WHEREAS, the consent of Congress, pursuant to Section 9 of the Rivers and Harbors Act of 1899, to the construction of a water diversion structure by the Commission from the north shore of the Potomac River at the Commission's water filtration plant to the north shore of Watkins Island is conditioned in Section 181 of the aforesaid Water Resources Development Act of 1976 upon an enforceable Low Flow Allocation Agreement; and

WHEREAS, it is the judgment of the Chief of Engineers and the Secretary of the Army, acting pursuant to Section 10 of the Rivers and Harbors Act of 1899, that the public interest requires that such a Low Flow Allocation Agreement be a requirement for issuance of the permits for the construction of water intake structures in the subject portion of the Potomac River by the Commission and the Fairfax County Water Authority;

NOW, THEREFORE, in consideration of the premises and of the public and governmental interests deemed to be served hereby, the parties hereto do mutually agree as follows:

ARTICLE 1. Enforcement.

A. Certain Definitions:

1. Pertinent Portion of the River. The portion of the Potomac River subject to this Agreement is that located

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between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland. This portion is referred to herein as "the defined portion" or, alternately "the subject portion" of the Potomac River.

2. Parties. The Government, the State, the Commonwealth, and the District shall be termed "the governing parties." All other parties hereto shall be termed "member parties." The term "parties" shall mean all parties, both governing and member, except when the context otherwise requires.

B. Moderator. Authority to enforce the provisions of this Agreement shall be vested in an unbiased Moderator. It shall be the duty of the Moderator and he shall have the authority:

1. To take all actions necessary to enforce the provisions of this Agreement and his decisions hereunder, and for this purpose he may sue in his own name.

2. To decide all disputes between or among the parties arising under this Agreement not disposed of by consent.

The authority of the Moderator shall not restrict those powers reserved to the parties, including those specified in Article 3, Section C.

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C. The decision of the Moderator shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, or not supported by substantial evidence. All parties agree to accept and implement every decision of the Moderator unless and until said decision is overturned by a court of competent jurisdiction.

D. The parties specifically grant to the Moderator the authority to inspect documents, records, meters, facilities, and other items necessary to decide any question or verify reports made by any party as a consequence of this Agreement. Upon the request of any party, the Moderator shall provide said party any or all of the information held by him relevant to this Agreement.

E. Should the Moderator decide to commence or defend any action or otherwise have need of legal services relating to this Agreement, he shall have the right to contract with counsel for such purpose, and the cost of such services shall be repaid in equal shares by the governing parties. In the interest of prompt action, the Moderator may accept legal services, or an advance of funds, for such purpose from any party. Nothing herein shall require a party being sued by the Moderator to advance funds for such purpose.

F. The Moderator shall not be liable for injury or damage resulting from any decision or action taken in good faith without malice under apparent authority of this agreement, even though such decision or action is later judicially declared to be unauthorized or invalid.

G. The Moderator shall be selected, and may be relieved of his duties for any reason, by unanimous action of the governing parties expressed in a signed memorandum. Should the office of Moderator become vacant through death, resignation, or otherwise, a new Moderator shall be selected as soon as practicable by such unanimous action. During any period in which the office of Moderator remains vacant through a failure of unanimous action or otherwise, the full functions of the office of Moderator shall be exercised by a Standby Moderator who shall, except as expressly otherwise provided, be treated as the Moderator for all purposes under the provisions hereof. The duty to designate the Standby Moderator shall rotate annually among the Government, the State, the Commonwealth, and the District in the order stated, beginning on the date this agreement becomes effective and rotating thereafter on the first day of each calendar year. Written notice of such annual designation shall be sent to all other parties by January 15 of each year. The first Moderator for this Agreement is designated in Annex A hereto.

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H. Subject to the availability of funds, the reasonable expenses, including legal fees, and compensation of the Moderator shall be paid in equal shares by the governing parties. Any expense shall be deemed reasonable if at least three of the governing parties so agree or if so determined by a court. If any such party accepts as reasonable a particular expense not accepted as reasonable by the other such parties, that party may pay that expense, in addition to that party's proportionate share of all other expenses. At the time of each annual review as provided in Article 4 of this agreement, the governing parties shall set, by majority vote, the per diem fee to be paid a Moderator in the event his services shall be necessary. A Standby Moderator, who is an employee of the designating party or one of its political subdivisions or agencies, shall serve without fee in exercising the functions of the Moderator.

I. The Moderator or any party may bring an action against any one or more other parties to enforce this Agreement or a decision of the Moderator made hereunder. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in said court and to service of process upon it from said court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States. In any such action the joinder of all

parties hereto shall not be deemed necessary or indispensable merely because they are parties to this Agreement. Application for or receipt of a determination by the Moderator shall not be a prerequisite to the maintenance of an action by a party, but any decision made by the Moderator on a matter involved in said action, whether before or after commencement thereof, shall be given the effect set forth in Article I, Section C. Nothing herein shall be deemed to be a waiver of any immunity any party may have from a claim for monetary damages or a claim which has substantial fiscal impact, except for the fees and expenses which are provided to be paid pursuant to the agreement. It is the intention of the parties that any matters involving the technical aspects of maintenance of litigation be resolved in a manner which ensures rapid and certain enforcement of this Agreement.

ARTICLE 2. Administration.

A. Washington Aqueduct. The Government will provide a communication control center at the Washington Aqueduct for the administration of the allocation plan as provided herein. The Washington Aqueduct Division, U. S. Army Engineer District, Baltimore ("the Aqueduct"), will collect, receive, record and accumulate daily reports regarding the flow of the Potomac River and the quantities of water being withdrawn from the defined portion of the Potomac River, and the quantities of water withdrawn and available from all other

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sources for use within the Washington Metropolitan Area, by the parties and the political subdivisions, authorities, and permittees of any of them, and by any other water withdrawing entity which may formally be added or made subject to this Agreement subsequent to its initial execution. Subject to the parties' rights of appeal to the Moderator, the parties grant to the Aqueduct, and to each other, the right to inspect documents, records, meters, facilities and other items necessary to decide any question or verify reports made by any party as a consequence of this agreement. Beginning with the Alert Stage, the Aqueduct will keep the Moderator informed as to the stage of flow in the Potomac River, and, during the Restriction and Emergency Stages the fair share allocated to each user, and all information utilized for determining the allocation. The Aqueduct will provide all parties with the same information relating to allocation, the quantities of water being withdrawn by all users from any and all sources, and the flow of the Potomac River. To permit uniformity of reports and to implement the administrative measures specified herein, reports and calculations, by or to the Aqueduct, of daily withdrawals or daily flows, will be based on the twenty-four hour period from one midnight to the following midnight, unless the parties subsequently agree to a different twenty-four hour measuring period. The Aqueduct will calculate the total daily flow by adding the withdrawals during the previous 24 hours at all withdrawal points and the

remaining daily flow over the Washington Aqueduct Dam at Little Falls, as determined by the readings recorded on the USGS gage at Little Falls during the preceding twenty-four (24) hours. The average reading will determine the flow over the dam for the previous day.

B. Stages of Flow in the Potomac River. The Aqueduct will determine from the information accumulated when the following stages exist in the defined portion of the Potomac River.

1. Alert Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than fifty percent (50%) of the total daily flow, but less than 80%, the Aqueduct will declare an "Alert Stage" to be in effect.

2. Restriction Stage. When the total daily withdrawal from the subject portion of the Potomac River is equal to or greater than eighty percent (80%) of the total daily flow, the Aqueduct will declare a "Restriction Stage" to be in effect and the Aqueduct will request the U. S. Park Service to discontinue putting Potomac River water into the C&O Canal.

3. Emergency Stage. When the estimated total daily withdrawal for any day within the ensuing five (5) days

from the subject portion of the Potomac River is expected to exceed the daily river flow anticipated, the Aqueduct will declare an "Emergency Stage" to be in effect.

C. Allocation of Flow. Whenever the Restriction Stage or the Emergency Stage is in effect, the Aqueduct shall daily calculate and advise each user (as defined herein), and the Moderator, of each user's allocated fair share of the water available from the subject portion of the Potomac River in accordance with this Section C. In calculating the amount of water available for allocation, the Aqueduct will determine, in consultation with the parties and based upon then current conditions and information, any amount needed for flow in the Potomac River downstream from the Little Falls dam for the purpose of maintaining environmental conditions ("environmental flow-by"), and shall balance such need against essential human, industrial and domestic requirements for water. The Aqueduct's determination shall be based upon the data and shall give substantial weight to conclusions for environmental flowby submitted by the State.

1. For the purposes of this Section C, the term "users" refers to the following entities which are or may be appropriating water for public water supply purposes from the subject portion of the Potomac River; namely, the Government (including its water customers), the Commonwealth for and on behalf of herself and each of her political subdivisions and

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authorities (including the Authority), the State and the Administration (for and on behalf of its permittees whether or not parties to this Agreement), the District of Columbia, the Commission, and such entities which may formally be added or made subject to this Agreement subsequent to its initial execution.

2. Each user shall report to the Aqueduct (and to each other) the number of gallons of processed water pumped daily to all its customers from all sources during each winter period (the months of December through February), commencing with the winter period 1977-78. The amounts pumped during the 5 most recent winter periods which have elapsed as of the time of allocation, or less than 5 if fewer have so elapsed, shall be combined for the purpose of computing each user's average daily winter use; except that, in the case of a user first withdrawing water subsequent to the initial execution of the Agreement, the average daily winter use of such user shall be the average of the amounts of water pumped during all of the winter periods, commencing December 1 of the year immediately prior to its first withdrawal from the subject portion of the river, which have elapsed as of the time of allocation, but not exceeding the 5 most recent winter periods. The ratio which the average daily winter use of each user bears to the average daily winter use of all users will be applied to the daily amount of water available at the

time of allocation from the subject portion of the Potomac River (after deduction for environmental flow-by) and all other sources as specified in Paragraph 5 below (calculated at maximum capacity practicable). The resulting amount, less the amount then available to said user by use of the maximum capacity practicable from all such other sources, will be such user's allocated fair share of the flow of the Potomac River.

3. a. The formula set forth in Article 2.C.2. shall continue in effect unless changed by unanimous consent of the governing parties or as set forth below. After January 1, 1988, any of the governing parties which desires to change the allocation formula shall give written notice to all other parties. Within 60 days thereafter, both the governing and member parties shall meet for the purpose of negotiating a replacement formula. In the event that no such replacement formula is agreed on by the governing parties within one year after receipt of the aforesaid notice, the allocation ratio which would have been in effect for the summer of the year in which the notice was given shall be used as an interim allocation ratio for the withdrawal of water during subsequent periods of low flow until such time as the governing parties agree upon a replacement formula. Any governing party, at any time after the expiration of one year from the receipt of such notice and after the exhaustion of such administrative procedures as may be applicable if it is a permittee for

water appropriation or withdrawal, may apply to a court of competent jurisdiction for an adjudication of such rights, if any, as it or users associated with it may have to a greater share of water than set by the interim allocation ratio, provided that all parties shall adhere to the interim allocation ratio until and unless altered by a decision of such court. Applications for intakes or other modifications to water works shall continue to be received and processed during periods in which the interim allocation ratio is in effect, but such ratio shall be recalculated only in the event of the grant of an application to a new user as set forth in Section E of Article 3.

b. Any formula negotiated pursuant to subparagraph a hereof shall allocate water on a fair and equitable basis and shall take into consideration, among other things, (a) steps taken by parties which can do so to minimize dependence upon the Potomac River during periods of low flow, (b) the nature and effectiveness of water conservation methods put into effect, (c) steps taken to increase the water supply available for the Washington Metropolitan Area, (d) then current population growth and planning for future growth, (e) feasibility and availability of new sources of water, and (f) technological advances in water treatment and water quality measurement.

c. In any court proceeding instituted pursuant to subparagraph a, neither the signing of this agreement nor the

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passage of time thereafter shall be asserted as a waiver or diminution of any party's rights to, or right to seek, a greater share of water from the subject portion of the river. Such action shall be brought in the United States District Court for the District of Columbia, and each party consents to venue in such court and to service of process upon it from such court, provided that if the action is between two states of the United States, such action may be commenced in the Supreme Court of the United States.

4. In the event the applicable allocation formula results in an allocation exceeding the proposed withdrawal of any user, the excess amount shall be reported by said user to the Aqueduct for reallocation.

5. The water subject to the allocation formula under the terms of this Agreement includes the maximum capacity practicable from Patuxent and Occoquan as it exists in each case on December 31, 1977, and both the natural flow and the augmented flow from existing upstream reservoirs, in addition to Bloomington Lake, of the subject portion of the Potomac River. Any other augmentation to flow, reservoir storage, or treating capacity developed by a user after December 31, 1977, shall not be made subject to the allocation formula, but those users who incur, or participate in the payment of, the expenditures for such augmentation may agree as to how it is to be divided and shall file a copy of said agreement with

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the other parties. In recognition that the sole source of water supply for the District of Columbia is the Potomac River, each other party will offer the District an opportunity to participate in a portion of any additional augmentation for use during the Restriction and Emergency stages on reasonable terms, unless such party shows that it is infeasible to do so.

6. In the event a disaster, such as a major fire or water main break, results in an abnormal loss of a significant portion of any user's water supply, the Aqueduct shall determine suitable adjustments in low flow allocation during the emergency period created by the disaster only, taking into consideration all sources available to the users.

7. Water from the emergency pumping station having its intake at the estuary of the Potomac shall not be considered as water available from other sources for the purposes of Section 2.C.2. or otherwise included in computations made under this agreement.

ARTICLE 3. Obligations of the Parties.

A. The Government agrees to cause the Aqueduct as the operating agency to perform the functions and requirements which are required of the Government and the Aqueduct in this Agreement, including the furnishing of information to the other parties relating to the Aqueduct's water withdrawal and use, the same as required by other parties to be furnished

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to the Aqueduct under Subparagraphs B and D, of this Article. These functions and responsibilities of the Aqueduct shall be carried out under the supervision of the District Engineer, U.S. Army Engineer District, Baltimore, or his designee, who shall be responsible for making the determinations required in the discharge of these responsibilities.

B. The parties agree to provide the Aqueduct with all the information relating to the withdrawal and use by them, their permittees, entities reporting through them and their political subdivisions, as applicable, of the waters of the subject portion of the Potomac River and availability from other sources which is needed for the administration of the allocation system.

C. The State agrees that all appropriation permits granted by the Administration for any appropriation of water from the subject portion of the Potomac River shall include a provision subjecting the permittee to the provisions of this Agreement. Nothing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River; nor any such authority as the Commonwealth may have; nor the authority of the Government with respect to navigable waters,

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including the regulation of commerce among the states and with foreign nations.

D. The parties will comply with the determinations made by the Aqueduct pursuant to this Agreement, unless and until overturned pursuant to the terms of Article 1.

E. Any community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which includes the low flow allocation formula and such other provisions as are necessary to effect the purposes of this Agreement. Any such community or entity may apply for permits necessary to build water intake structures or to appropriate water, and such permits shall be processed in accordance with the rules and regulations of the permit-issuing agency, notwithstanding the pendency of negotiations or the imposition of an interim allocation ratio pursuant to Section 2.C.3. If the necessary permits are granted to a community or entity not previously withdrawing water from the subject portion of the river, the existing interim allocation ratio shall be recalculated based on winter period use for the year immediately prior to the first withdrawal from the subject portion of the river by such new user. The average daily winter use of the new user for such winter period and those of the other users employed in determining the interim allocation ratio shall be employed

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to compute a revised interim allocation ratio which shall remain in effect until a replacement formula is determined pursuant to Section 2.C.3.

F. This Agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages.

ARTICLE 4. Review

In the month of April in each year during the term of this Agreement the parties shall convene for the purpose of reviewing the provisions of this Agreement and considering any modifications thereof, and make such modifications as the governing parties agree upon. Upon agreement among the governing parties, review and modifications as might be agreed upon can occur at any time and not be necessarily limited to the annual, April consideration. Entities shall be admitted as new member parties upon unanimous agreement of the governing parties.

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ARTICLE 5. Revocation.

This Agreement shall not be revoked without the unanimous consent of the governing parties.

ARTICLE 6. Effective Date.

This Agreement shall become binding when: (1) it is executed by the parties, and (2) a Moderator has been selected as provided in Article 1.G, and (3) the Government issues one or more permits for the construction of any water diversion structure or water intake in the subject portion of the Potomac River to any party hereto or political subdivision or authority thereof, and (4) all acts have been taken by each of the parties hereto necessary to make this agreement binding and enforceable with respect to each of them, including, if necessary, ratification by the legislatures of the signatory states. Notice that all such necessary acts have been taken by each of the parties shall be delivered to the other parties along with the opinion of its respective counsel or attorney general that the acts taken are sufficient to cause this agreement to become effective, binding and enforceable under the laws or charter of such parties. The parties will, however, commence to record and maintain the consumption figures and other base data called for under the foregoing provisions of this Agreement, at the time they execute this Agreement. This Agreement may be executed in one or more counterparts.

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ARTICLE 7. Severability.

The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of the agreement is declared to be unconstitutional or the applicability thereof to any party is held invalid, the remainder of such agreement shall not be affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written, except as a different date of execution may be noted following any party's signature.

VA-SRC-001426

ATTEST:

Charles I McGinnis

THE UNITED STATES OF AMERICA

BY Cyrus R. Vance
Secretary of the Army

J. W. Morris
Chief of Engineers

THE STATE OF MARYLAND

Herbert F. Sachse

BY Blair Lee III
Governor

James B. Coulter
Secretary of Natural Resources

THE COMMONWEALTH OF VIRGINIA

R. V. Davis

BY Mills E. Godwin, Jr.
Governor

J. Lee Barnes
Vice Chairman, State Water Control Board

THE DISTRICT OF COLUMBIA

Martin K. Schaller
EXECUTIVE SECRETARY, D. C.

BY Walter E. Washington
Mayor

Herbert F. Fuchs
Director of Environmental Services

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ANNIVERSARY 1776-1976

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THE WASHINGTON SUBURBAN SANITARY COMMISSION

BY _____
Chairman

FAIRFAX COUNTY WATER AUTHORITY

BY _____
Chairman

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WATER SUPPLY COORDINATION AGREEMENT

THIS AGREEMENT, dated for convenience of reference as the 22 day of July, 1982, made and entered into by and among the UNITED STATES OF AMERICA acting through the Baltimore District, Corps of Engineers, U.S. Army, functioning through the Washington Aqueduct Division (hereinafter called the "Aqueduct"); the FAIRFAX COUNTY WATER AUTHORITY (hereinafter called the "Authority"); the WASHINGTON SUBURBAN SANITARY COMMISSION (hereinafter called the "Commission"); the DISTRICT OF COLUMBIA (hereinafter called the "District"); and the INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC (hereinafter called the "CO-OP").

WITNESSETH

WHEREAS, the Chief of Engineers is charged with the operation and maintenance of the Washington Aqueduct for the purpose of providing an adequate supply of potable water for distribution to and consumption by the agencies and instrumentalities of the Federal Government situated in the District and its environs, and of providing a public water supply for the inhabitants of the District, and certain communities in northern Virginia; and

WHEREAS, the Authority is an authority established pursuant to the laws of the Commonwealth of Virginia charged with responsibility for providing a safe and adequate public water supply within certain geographic areas of northern Virginia, and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the Commission is a public authority established pursuant to the laws of Maryland, is charged with the responsibility of providing a safe and adequate water supply within the Counties of Montgomery and Prince George's, Maryland and is also authorized to enter into agreements to purchase and provide water, and for that purpose is operating and maintaining water treatment facilities and a water distribution system; and

WHEREAS, the District is authorized and empowered to contract to provide a safe and adequate water supply to the inhabitants and entities within its jurisdiction and accomplishes this purpose through cooperation with the Washington Aqueduct Division, Corps of Engineers, United States Army, and is also authorized to contract for the purposes described herein; and

WHEREAS, the Interstate Commission on the Potomac River Basin (ICPRB) has created CO-OP devoted to forecasting demand and supply in the Washington Metropolitan Area; and

WHEREAS, CO-OP has developed a program for optimal utilization of all available water supply facilities in the Washington Metropolitan Area, particularly during drought periods; and

WHEREAS, the Aqueduct, the Authority, and the Commission (hereinafter called the "suppliers") now have in place, on the Potomac River, water intakes installed in accordance with appropriate Federal and state laws; and

WHEREAS, the suppliers are governed by the provisions of the Potomac River Low Flow Allocation Agreement, dated January 11, 1978, which is hereby incorporated by reference into this agreement and made part thereof; and

WHEREAS, it is in the mutual benefit of the suppliers to manage Potomac River flows, reservoir releases, and water supply withdrawals so as to reduce or eliminate the possibility that the Emergency Stage of the Low Flow Allocation Agreement will ever be reached or that the allocation formula set forth therein becomes operative.

NOW, THEREFORE, in consideration of the mutual covenants herein contained the parties hereto do hereby agree as follows:

ARTICLE 1. - The suppliers agree to operate their respective water supply systems in a coordinated manner so as to provide the optimal utilization of all available water supply facilities for the benefit of the inhabitants of the Washington Metropolitan Area.

ARTICLE 2. - The Authority and the Commission agree to operate their non-Potomac water supplies (Occoquan River and Patuxent River) so as to maximize the availability of reservoir storage associated therewith for use during periods of low flows in the Potomac River.

ARTICLE 3. - The District, the Authority, and the Commission agree that, notwithstanding the extent to which they each may participate in the cost of construction, operation and maintenance of Bloomington Lake, and the proposed Little Seneca Lake and in the operation and maintenance costs of the Savage Reservoir, releases of water from Bloomington Lake water supply storage and Little Seneca Lake shall be made as provided by this agreement.

ARTICLE 4. - The suppliers agree that all available water supply facilities shall be managed and operated as provided in the attached Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers (hereinafter called the "Operations Manual"), which manual is hereby made part of this agreement.

ARTICLE 5a. - CO-OP agrees to provide the administrative, technical, supervisory and managerial services set forth in the attached Operations Manual and the District, the Authority, and the Commission agree to pay the costs thereof in the following proportions: District-30%, Authority-20% and Commission-50%.

ARTICLE 5b. - The District shall take all necessary actions to procure the required appropriations to meet its cost sharing obligations hereunder; provided, however, that no payments shall be made by the District until appropriations for such purposes have been made pursuant to the requirements of the Budget and Accounting (Anti-Deficiency) Act of 1921 (31 U.S.C. 665) as amended.

ARTICLE 6. - The parties agree that the services to be provided by CO-OP may be terminated at any time either by the unanimous agreement of the District, the Authority and the Commission or by CO-OP, in which event CO-OP shall deliver to the suppliers all computer hardware and software, equipment, supplies, records, etc., which may have been acquired or developed at the expense of the District, the Authority, and the Commission and thereupon the suppliers shall make appropriate arrangements for continuing the functions, duties and responsibilities theretofore performed by CO-OP. The District, the Authority, and the Commission agree to pay necessary termination expenses incurred by CO-OP.

ARTICLE 7. - The suppliers do hereby establish an Operations Committee which shall comprise a representative of each supplier. The Committee shall be responsible for overseeing implementation of this agreement and the Operations Manual and shall be empowered, upon unanimous agreement, to revise the Operations Manual as circumstances may require. The Operations Committee shall:

(a) as necessary, review decisions of the Director of CO-OP and by unaminous agreement, change such decisions and so inform the Director of CO-OP,

(b) monitor compliance with the terms of this agreement and the Operations Manual,

(c) provide executive support to the Director of CO-OP within their agencies,

(d) approve expenditures of CO-OP relevant to the terms of this agreement,

(e) establish joint and coordinated operating procedures for use by the suppliers to monitor supply (including rainfall forecasts) and demand during emergencies and droughts, and

(f) establish CO-OP as the agency responsible for executing the procedures in 7(e) above and for the establishment and maintenance of a system for monitoring supply and demand and performing drought management analysis.

ARTICLE 8. - The consideration for this agreement is the promises herein exchanged based upon the premises above mentioned and the public and governmental interests deemed necessary and desirable by the parties to this agreement.

ARTICLE 9. - It is agreed that the waters released from Bloomington Lake water supply storage and Little Seneca Lake are to be utilized to achieve the objectives of this agreement without regard to any cost-sharing by the District, the Authority, and the Commission in Bloomington Reservoir and Little Seneca Lake.

ARTICLE 10. - In April 1990 and in April of each fifth year thereafter during such time as this agreement is in effect and the proposed Little Seneca Lake has been constructed and is operational, the Aqueduct, the Authority, the Commission and the District shall review and evaluate the adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding twenty year period. If as a result of any such review and evaluation it is determined that additional water supplies will be required to meet the expected demands, the Aqueduct, the Authority, the Commission and the District shall undertake negotiations to provide the required additional water supplies and, when provided, water from such additional water supplies shall be included as water subject to the allocation formula under the terms of the Potomac River Low Flow Allocation Agreement. Such facilities shall be operated under the terms of this agreement. The District, the Authority, and the Commission agree that the costs of construction, operation and maintenance of such additional water supplies shall be shared among these parties in accordance with the following formulae:

$$\text{District's Share} \quad -\% = \frac{(A-B)}{(A-B) + (C-D) + (E-F)} \times 100$$

$$\text{Authority's Share} \quad -\% = \frac{(C-D)}{(A-B) + (C-D) + (E-F)} \times 100$$

$$\text{Commission's Share} \quad -\% = \frac{(E-F)}{(A-B) + (C-D) + (E-F)} \times 100$$

Where:

A = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during the month of July in each of the five (5) years immediately preceding the award of a contract(s) for the construction of the additional water supply facilities.

B = The average number of gallons of processed water pumped daily by the Aqueduct to all its customers from all sources (expressed in million gallons per day) during the month of July in each of the years 1981 through 1985.

C = Same as A, except substitute the number of gallons of processed water pumped daily by the Authority.

D = Same as B, except substitute the number of gallons of processed water pumped daily by the Authority.

E = Same as A, except substitute the number of gallons of processed water pumped daily by the Commission.

F = Same as B, except substitute the number of gallons of processed water pumped daily by the Commission.

Whenever application of the above formulae results in a negative amount for any one of these parties, such party's share of the costs shall be zero. Thereupon, the formulae applicable to the other two parties shall be revised by eliminating therefrom the term which relates to the party with zero cost share (e.g., if the District's share is zero, the term (A-B) shall be eliminated; if the Authority's share is zero, the term (C-D) shall be eliminated; and if the Commission's share is zero, the term (E-F) shall be eliminated) and the revised formulae shall be applied to determine the respective shares of costs to be borne by the other two parties. Whenever application of the above formulae results in negative amounts for any two of these parties, their respective shares of the costs shall be zero and the entire costs shall be borne by the third party.

ARTICLE 11. - The suppliers, the District and CO-OP agree to utilize their best efforts to resolve any disputes which arise under this agreement or the Operations Manual by informal negotiation, the resolution of which shall require unanimous agreement of the suppliers, and the District. However, any party may initiate litigation, the purpose of which is to construe a provision of or resolve a dispute that arises under this agreement or the Operations Manual. The parties to this agreement hereby agree the issues to be litigated may be litigated in any court of competent jurisdiction sitting in Maryland, Virginia, or the District of Columbia and consent to venue in any such court and to the service of all papers and pleadings related thereto. Pending final resolution of any dispute, the provisions of this agreement and the Operations Manual shall continue in effect.

ARTICLE 12. - The effective date of this agreement shall be the date on which the last party executes the same.

ARTICLE 13. - Unless sooner terminated by unanimous agreement of the suppliers, and the District, this agreement shall continue in effect for as long as the water systems of the suppliers remain in existence and operation.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date which appears with their respective signatures.

Approved in form and in legal sufficiency:

Date: 28 July 1982

UNITED STATES OF AMERICA

By: Donald C. Brown
District Engineer,
Baltimore District, Corps
of Engineers, U.S. Army

Date: 22 July 1982

FAIRFAX COUNTY WATER AUTHORITY

By: Frank C. Morris
Chairman

Date: July 22, 1982

Date: July 22 '82

WASHINGTON SUBURBAN SANITARY COMMISSON

By: Robert B. McGarry
General Manager

Date: July 22, 1982

Date: 22 Jul 82

THE DISTRICT OF COLUMBIA

By: [illegible]
Mayor

Date:

Date: 7-22-82

INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN SECTION FOR COOPERATIVE WATER SUPPLY OPERATIONS ON THE POTOMAC

By: Robert H. Jones

Date: July 22, 1982

Date: July 22, 1982

L-316

I, Henry P. Stetina, of Bethesda, Maryland, General Counsel to the Interstate Commission on the Potomac River Basin make oath and say that I, in the presence of the Executive Director, affixed the Common Seal of the Commission to the annexed Water Supply Coordination Agreement dated July 22, 1982, A.D., 1982, and that I saw the Chairman of CO-OP sign, execute and deliver said Contract as and for the act and deed of the CO-OP Section of the Commission and that I countersigned the said Contract to complete the due execution thereof. And further that the seal affixed and impressed at the foot or end of the said Contract is the Common Seal of the Commission and was affixed and impressed thereto by myself by a resolution adopted on the 29th day, of June A.D., 1982 and with the authority of the Commissioners of CO-OP and in conformity with procedures required for the authentication of the Contract.

Henry P. Stetina
General Counsel

Paul W. Eastman
Executive Director
(Witness)

VA-Gen-00050

L-317

Drought-Related Operations Manual
for the Washington Metropolitan Area Water Suppliers

(Attachment to Water Supply Coordination Agreement,
dated July 22, 1982)

I. Introduction

This manual details operations rules and procedures for reducing the impacts of severe droughts in the Potomac River Basin. Although the primary emphasis is on water supply for the Washington Metropolitan Area, the rules and procedures are consistent with maintaining instream flow and water quality in both upstream and downstream portions of the basin.

II. Objectives

A. Make the most efficient use of all water supply facilities, including but not limited to the Potomac River, Bloomington Lake, Occoquan Reservoir, Triadelphia Reservoir, Duckett Reservoir, and the proposed Little Seneca Lake to meet all water supply needs for the Washington Metropolitan Area.

B. Maintain the probability of invoking the Restriction Stage of the Potomac River Low Flow Allocation Agreement at less than 5 percent during a repeat of the historical streamflow record.

C. Maintain the probability of entering the Emergency Stage of the Potomac River Low Flow Allocation Agreement at less than 2 percent with full reservoirs on June 1 of any year.

D. Maintain the probability of not refilling any reservoir used for Washington Metropolitan Area water supply to 90 percent of useable capacity by the following June 1 at less 5 percent during a repeat of the historical streamflow record.

E. Maintain flows in the Potomac River below Seneca Pool as agreed to by the signatories to the Potomac River Low Flow Allocation Agreement.

F. Minimize conflict between normal utility operations and drought operations.

G. Provide consistency with the requirements of the Potomac River Low Flow Allocation Agreement.

III. Facilities and Operations Directly Affected.

A. Potomac River facilities of the Washington Aqueduct Division, U.S. Army Corps of Engineers, Washington Suburban Sanitary Commission, and the Fairfax County Water Authority.

B. Washington Suburban Sanitary Commission water supply facilities on the Patuxent River.

C. Fairfax County Water Authority water supply and power generating facilities on the Occoquan River.

D. Finished water interconnections between the Fairfax County Water Authority and the Washington Aqueduct Division, U.S. Army Corps of Engineers supplied water utilities in Virginia, subject to the approval of Arlington County and/or the City of Falls Church.

E. Water supply releases from the proposed Little Seneca Lake.

F. Water supply releases from water supply storage in Bloomington Lake.

IV. Implementation

A. Whenever gauged flows at Point of Rocks are below 2000 cfs, CO-OP will compute flows in the Potomac River at Little Falls Dam, including all prior water supply withdrawals for the Washington Metropolitan Area on a daily basis.

B. CO-OP will issue long-range water supply outlooks on a monthly basis from May through October. Additional outlooks will be issued as needed. These outlooks will contain estimates of the probability of meeting long-range unrestricted demands from current storage, and then refilling

every reservoir to at least 90 percent of useable capacity by the following June 1.

When computing probabilities, CO-OP shall consider gross storage in all local reservoirs, less the following allowances for unuseable storage: a) Occoquan - 1 billion gallons; b) Patuxent (Triadelphia plus Duckett) - 2 billion gallons; and c) Little Seneca Lake - .5 billion gallons.

C. The rules set forth in Section V. shall take effect when one or both of the following conditions exist.

(1) The probability of meeting all unrestricted demands and refilling all reservoirs to 90 percent of useable capacity by the following June 1 is less than 98 percent.

(2) Flow in the Potomac as computed in IV-A above, less the amount required for flow-by over Little Falls Dam is projected to be less than twice the projected withdrawals for any of the next five days.

V. Operating Rules

A. During such time as the rules are in effect (per IV-C above) each supplier shall report daily to CO-OP, no later than 8:30 A.M., its 24 hour demand ending at 6:00 A.M. on that day.

VA-Gen-00054

B. During such times as these rules are in effect, the Director of CO-OP shall, following the objectives outlined in II above, and using techniques approved by the Operations Committee:

(1) Consult with the suppliers and the U.S. Army Corps of Engineers as required and direct the appropriate releases from water supply storage in Bloomington Lake and Little Seneca Lake.

(2) Prior to 10:00 A.M. daily set withdrawal rates from the Potomac for the Authority and the Commission for the 24 hour period beginning at 6:00 A.M. on that day.

C. As early as practicable during each day, the Director of CO-OP shall revise the Authority's and the Commission's Potomac withdrawal rates in light of actual river flow and water demands.

D. Whenever the Aqueduct declares the Restriction or Emergency Stage of the Potomac River Low Flow Allocation Agreement to be in effect, the allocation provisions of the Potomac River Low Flow Allocation Agreement shall determine Potomac withdrawals.

E. During such times as these rules are in effect power generation at the Occoquan River shall cease.

F. Should the probablity of meeting unrestricted demand with existing storage fall below 95 percent, each supplier agrees to so advise the governing bodies of the jurisdictions which they serve and to recommend restrictions on water use.

G. Raw water released from Lake Manassas and reimpounded in the Occoquan Reservoir shall be treated as Occoquan storage under these rules.

VI. Review by Operations Committee

A. The Operations Committee shall be responsible for overseeing the administration and implementation of this manual and, by unanimous agreement, shall be empowered to overrule or modify any action taken, or proposed to be taken, hereunder by the Director of CO-OP.

L-323

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

DECLARATION OF MARK KRONENTHAL, II

I, Mark Kronenthal, II, declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration.

2. I attended the public hearing on February 22, 2000, of the Senate Economic & Environmental Affairs Committee of the Maryland General Assembly, concerning Maryland Senate Bill 729.

3. The sponsor of S.B. 729, Senator Christopher Van Hollen, stated at the hearing that his legislation, like the bill he proposed the previous year, was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. Senator Van Hollen said that his bill would permit Virginia to have an offshore intake in the Potomac River, but that it would limit the intake capacity to 205 million gallons per day ("MGD"), rather than the 300 MGD capacity sought in the permit application. He stated that the purpose of this limitation was to make sure "they are not fueling more development on the Virginia side of the river, which has been out of control." He stated that a further purpose of his bill was that, since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the right to withdraw water from the Potomac River without Maryland's consent, the limitation

on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval.

4. At the conclusion of the hearing, Senator Clarence W. Blount, the Committee Chairman, remarked that if "Virginia and Maryland were independent states, we would be at war over this."

5. I have also listened to relevant portions of the official audio recordings of the proceedings of the Maryland Senate from March 16, March 17 and March 21, 2000. Those proceedings are available to the public on the Internet at http://mlis.state.md.us/asp/listen.asp. When S.B. 729 as approved by the Senate Committee on Economic and Environmental Affairs was introduced to the full Senate on March 16, 2000 (3/16/00 Senate Recording at 23:41), the floor sponsor said that "what it addresses is the question relating to the County of Fairfax and Virginia's application for a new intake pipe." (3/16/00 Senate Recording at 26.00).

6. S.B. 729 was laid over on March 16, 2000 (3/16/00 Senate Recording at 28:24-29:7), amended on March 17, 2000 (3/17/00 Senate Recording at 51:21, 52:25-58:32), and again on March 21, 2000 (3/21/00 Senate Recording at 1:37:00), to provide an exception (in section 1(c)) that would allow three affected Maryland entities (Pepco, Alleghany Power, and Westvaco) to be exempted from the Bill's prohibition on the construction of water intakes in the Potomac River.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000

Mark Kronenthal, II

L-325

No. 129, Original

In the
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

DECLARATION OF ROLAND C. STEINER, Ph.D., P.E.

I, Roland C. Steiner, state that the following facts are true to the best of my knowledge, information and belief:

1. I am the Associate Director for Water Resources for the Interstate Commission on the Potomac River Basin ("ICPRB"), 6110 Executive Blvd., Rockville, Maryland. The ICPRB was created by an interstate compact between the states of Maryland, West Virginia, Virginia, Pennsylvania and the District of Columbia. In accordance with its enabling legislation, the ICPRB, among other things, performs analyses and studies relating to water quality, supply and demand in the Potomac River Basin. As part of my professional responsibilities, I conduct analyses concerning the Potomac River (the "River") and am familiar with statistical details concerning the River, including digital mapping information.

2. The length of the Potomac River from its first spring on the North Branch to the mouth of the River at the Chesapeake Bay is approximately 383 statute miles.

3. The length of the River from its first spring on the North Branch to the confluence of the North Branch and the South Branch of the River is approximately 99 statute miles.

4. The length of the River from the confluence of the North Branch and the South Branch of the River to the intersection of the Maryland State line and the West Virginia and Virginia State lines is approximately 114 statute miles.

5. The length of the River from the intersection of the Maryland State line and the West Virginia and Virginia State lines to the foot of Little Falls, just above the point where the River enters the District of Columbia opposite the Commonwealth of Virginia, is approximately 54 statute miles. The furthest upstream extent of the tidal reach of the River is at the foot of Little Falls.

6. The length of the River's tidal reach from the foot of Little Falls to the mouth of the River at the Chesapeake Bay is approximately 117 statute miles.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On: Nov. 30, 2000

Roland C. Steiner, Ph.D., P.E.

L-327

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

DECLARATION OF DALE C. HAMMES

I, Dale C. Hammes, declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind and have personal knowledge of the facts stated in this Declaration.

2. I am the General Manager of the Loudoun County Sanitation Authority ("LCSA") where I have been employed since 1977.

3. LCSA is a political subdivision of the Commonwealth of Virginia, chartered with the responsibility to provide water service to the residents of Loudoun County, Virginia.

4. In 1990, LCSA provided water service to a population of 40,500 people. In 2000, LCSA served a population of 102,114. For 2005, LCSA estimates a responsibility to serve a population of 145,000 and 187,000 for the year 2010 and 264,000 for the year 2020.

5. In 1990, LCSA experienced a maximum day water demand of 8.2 mgd and 17.6 mgd in 2000. LCSA projects maximum day water demand of 29.6 mgd for 2005, 38.1 mgd for 2010 and 53.7 mgd for the year 2020 and an ultimate water demand of approximately 75 mgd.

6. LCSA obtains finished water from the Fairfax County Water Authority and from the City of Fairfax, Virginia. At present, neither of those two water providers can commit to providing additional water supply to LCSA. LCSA projects that it must obtain an additional 3 mgd of water supply by the year 2005, and an additional 11 mgd by 2010 and an additional 27 mgd by the year 2020 and 48 mgd by maximum system build out.

7. LCSA is faced with a shortage of water supply to meet projected maximum day water demands.

8. In 1993 to meet its water supply needs, LCSA purchased 22.7 acres along the Potomac River in Loudoun County, Virginia, for the purpose of constructing a water intake and treatment facility using Potomac River water. LCSA has planned for the use of Potomac River water since 1988.

9. The process to plan, design and construct water facilities is long and complex. LCSA has been and is actively pursuing completion of its plan to construct a water intake upon the Potomac. However, Maryland's delay of the Fairfax County Water Authority for 5 ½ years and its passage of SB729, which prohibits or limits the issuance of intake construction permits, makes the orderly planning and design activities uncertain and more costly. Until LCSA's rights to access and use Potomac River water are freed from the impositions by Maryland, LCSA's ability to meet the water supply needs of Loudoun County is in jeopardy. That uncertainty is forcing the LCSA to pursue additional, more costly contingency plans in the event that it is blocked from utilizing its Potomac River property to access the River. LCSA's planning has reached the point where it would have begun the permitting process but for the fact that it is relying on Virginia in this suit to vindicate its right to be free from Maryland's permitting requirements.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on June 7, 2001.

Dale C. Hammes

Dale C. Hammes

L-329

No. 129, Original

In the
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

DECLARATION OF CHARLIE C. CROWDER, Jr.

I, Charlie C. Crowder, Jr., declare that the following facts are true to the best of my knowledge, information and belief:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration. I am the General Manager of the Fairfax County Water Authority ("FCWA"). The FCWA is a governmental subdivision organized under the laws of the Commonwealth of Virginia. It supplies treated drinking water to approximately 1.2 million people in Northern Virginia (or approximately one in five Virginians not served from potable water wells). I have extensive experience, over 28 years, in planning and operating large metropolitan area water systems. My academic background includes an undergraduate degree in civil engineering from the Virginia Military Institute and a graduate degree in public administration from George Washington University.

2. The FCWA is in the process of building an offshore water supply intake in the Potomac River at the site of its existing shoreline intake on Lowe's Island, in Loudoun County, Virginia. Design of the offshore intake project (the "Project") commenced in 1994.

3. In January 1996, the FCWA applied for permits from federal and state governmental agencies. It received its federal permits from the United States Army Corps of Engineers, pursuant to the Clean Water Act and the Rivers and Harbors Act of 1899, on January

31, 1997. The Corps found that the Project would cause no significant adverse environmental impact. Although the Maryland Department of Environment ("MDE") received no public comments on the Project and elected originally not to conduct a public hearing, in April and May 1997, the Project became politically controversial in Maryland. Representatives of MDE informed us that Jean Cryor, a delegate to the Maryland House of Delegates, had insisted on a public hearing concerning the Project. At that hearing and thereafter, several members of the Maryland General Assembly elected from nearby districts condemned the Project as an effort by Virginia to increase its take of water from the Potomac River. A number of these elected officials also claimed that the Project would support economic growth in Virginia to the detriment of Maryland's interests. On December 10, 1997, the Water Management Administration of MDE declined to issue a waterway construction permit for the Project. The FCWA later found a letter in the MDE file for the Project, authored by Maryland Governor Parris N. Glendening on February 9, 1998, in which the Governor stated that he had decided the Project was not in the public interest. Numerous other letters from members of the Maryland General Assembly had urged MDE to reject the permit application. We believe that the permit was denied because of undue political pressure that was brought to bear on the regulatory officials at MDE.

4. In the Maryland proceedings, the FCWA contended that it was entitled to construct the offshore intake without the need for a waterway construction permit based on Article VII of the Compact of 1785 and Clause IV of the Black-Jenkins Award of 1877. On December 23, 1997, the FCWA commenced a formal, "contested case" proceeding in the Maryland Department of Environment, asserting its compact rights. Our counsel submitted several rounds of briefing concerning the compact issues to the administrative law judge ("ALJ") appointed to conduct the contested case hearing, and to the "final decision maker" appointed to render a final decision on behalf of MDE.

5. Neither the ALJ nor the final decision maker for MDE ever addressed the FCWA's compact arguments.

a. On November 11, 1998, the ALJ issued a ruling stating that she would "reserve ruling on the [compact] issue until the decision on the merits of this case."

b. After conducting the first two days of the hearing on December 3 and 7, 1998, the ALJ ruled, at the conclusion of MDE's case, that MDE had presented no evidence to show that the Project would harm the environment. On January 21, 1999, she issued a proposed ruling that the permit be issued, stating that it was unnecessary to reach the compact issues.

c. On June 7, 1999, the final decision maker for MDE issued an opinion remanding the matter back to the ALJ to take additional evidence on whether the Project was "needed" by Virginia. The final decision maker declined to discuss the FCWA's argument that the interstate compacts prevented Maryland from determining whether the FCWA or Virginia "needed" the offshore intake.

d. On November 12, 16, 17, 18 and 19, 1999, the ALJ took evidence on the "need" for the Project. On May 10, 2000, the ALJ issued an 89-page Proposed Decision finding

that the Project was necessary and was in the public interest. A true and accurate copy of this Proposed Decision is attached as Tab 1. At page 88 of her proposed decision, the ALJ declined "to address the issue of whether the terms of the Compact of 1785, or any other agreement, compel MDE to allow the construction. . . ."

e. On November 6, 2000, MDE's final decision maker issued a "Final Decision," ordering the Water Management Administration to issue a waterway construction permit to the FCWA based on the merits of the Project. A true and accurate copy of the Final Decision is attached as Tab 2. At page 21 n.6, the final decision maker found it "unnecessary to address the Authority's argument that the Compact of 1785 compels the Department to allow construction of the intake. . . ."

f. On December 5, 2000, MDE filed a petition for judicial review of its own final decision maker's ruling in the Circuit Court for Baltimore City, and a motion to stay issuance of the waterway construction permit. On December 18, 2000, the FCWA filed a notice, a true and accurate copy of which is attached as Tab 3, advising the court of the pendency of *Virginia v. Maryland*, No. 129, Orig., asserting again its rights under interstate compact, and reserving its right to have the interstate compact claims adjudicated by the Supreme Court. On January 16, 2001, the Circuit Court denied MDE's motion to enjoin construction of the Project and ordered MDE to issue the waterway construction permit forthwith. MDE issued a waterway construction permit on January 24, 2001. Construction of Stage I of the offshore intake Project began on February 1, 2001. On April 11, 2001, the Circuit Court dismissed MDE's appeal. The Circuit Court did not rule on the FCWA's compact claims.

6. The FCWA expended hundreds of thousands of dollars, including counsel, engineering and consultant fees, in litigating this matter in Maryland. The litigation also caused more than a four year delay in the construction of the offshore intake. Our engineers have estimated that this delay has cost between $500,000 and $1,000,000 per year in unnecessary solids treatment and operating expenses that would have been saved by operating with an offshore intake. All of these costs have been paid for through the rate structure charged to the FCWA's retail and wholesale customers. Those costs would not have been incurred had MDE recognized at the outset, as requested, that the FCWA was entitled to construct the offshore intake Project pursuant to its interstate compact rights.

7. The waterway construction permit issued by MDE in January 2001 contains a number of permit conditions that significantly and improperly intrude upon the FCWA's interstate compact rights.

a. The new intake has a capacity of 312 million gallons per day ("MGD"), which corresponds to the ultimate projected peak-day capacity for the Potomac River water treatment plant. However, the permit requires that the new water intake pipeline have a "physical component that cannot be modified without the consent of the Maryland Department of Environment and that will limit the capacity of the intake to 200 million gallons per day." That limitation is designed to force the FCWA to obtain a new water appropriation permit from Maryland before withdrawing additional water from the River than is presently allowed.

b. The waterway construction permit issued by MDE also forbids the use of "construction-in-the-wet" methods unless construction-in-the-dry is shown to be not reasonably practicable. The use of construction-in-the-wet methods was approved by the Army Corps of Engineers in the federal permits that were issued to the FCWA for this construction. Maryland's limitation on construction technique has not been shown to have any environmental benefit compared to "construction-in-the-dry," but it will limit competition among the contractors bidding on Stage II of the work, and will result in additional costs to complete the construction of the offshore intake.

c. The FCWA has notified MDE, both orally and in writing, that it objects to the waterway construction permit in general, and to these and other specific requirements, in particular, but that the FCWA will comply with the permit until such time as Maryland's permitting system and laws are determined to be inapplicable to Virginia and the FCWA in *Virginia v. Maryland*, No. 129, Orig.

8. As one of the three principal water providers in the Washington Metropolitan area, the FCWA will need additional quantities of water from the Potomac River. This increase is forecast by regional planning organizations and is in excess of the quantities currently authorized by MDE through its water appropriation permitting process. Projections for the development of the FCWA's Potomac River water supply facilities currently include expanding the treatment plant to a peak-day capacity of 300 MGD. However, MDE currently restricts the FCWA to the withdrawal of an annual average of 100 MGD, not to exceed a maximum of 200 MGD on any particular day. The present permit expires on April 1, 2008.

a. Paragraphs 12 through 14 of Virginia's Bill of Complaint accurately describe details concerning the 1978 Potomac River Low Flow Allocation Agreement ("LFAA"), the 1982 Water Supply Coordination Agreement and related cost-sharing agreements, and accurately set forth the FCWA's role in regional water supply efforts for the Washington Metropolitan area.

b. The FCWA (and its Northern Virginia customers) have expended well in excess of $9 million to date for its share of the capital, operating and maintenance costs of three upstream reservoirs in Maryland and West Virginia. These upstream facilities store upwards of 17.2 billion gallons of water supply to augment the natural flow of the River when needed, and have enabled the Washington Metropolitan area supplied by the three utilities to avoid any water supply restrictions under the LFAA. The FCWA's agreement under the Water Supply Coordination Agreement to share the cost of these reservoirs, and to share in the cost of developing and building additional water storage that may be needed in the future, is premised on its ability to withdraw water from the Potomac River on a fair and equitable basis with the other jurisdictions when needed to meet the demands of its customers.

c. The Section for Cooperative Water Supply of the Interstate Commission on the Potomac River Basin (ICPRB) has been supplied with the FCWA's future demand projections and has taken these projections into account in forecasting the adequacy of the

Washington Metropolitan area water supplies. However, the restrictions in the Maryland waterway construction permit, combined with the anticipated political opposition we expect from Maryland to increases in our future withdrawals, create significant uncertainty about the reliability of the Potomac River water supply for Northern Virginia. The currently demonstrated uncertainty of a fair and non-political evaluation of Virginia's water requirements by Maryland's water appropriation permitting system stands as a present obstacle to the FCWA's water supply planning.

9. Until the validity of Maryland's permitting system as applied to Virginia is adjudicated, the FCWA is threatened with criminal liability and civil enforcement proceedings if the FCWA fails to submit to it. For these reasons, the Supreme Court's determination of the validity of Maryland's authority to regulate Virginia's (and the FCWA's) access to the Potomac River is crucial to the FCWA's current water supply operations as well as to its short-term and long-term water supply planning.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 8, 2001

Charlie C. Crowder, Jr.

L-334

No. 129, Original

In the
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

DECLARATION OF ROBERT W. GRABB

I, Robert W. Grabb, declare that the following facts are true to the best of my knowledge, information and belief:

1. I am the Chief of the Habitat Management Division of the Virginia Marine Resources Commission (the "Commission" or the "VMRC"). I have served in this capacity since 1988, when I took over the position after Norman E. Larson retired. Prior to that time, I served as Deputy Chief of the Division. I have been employed with the VMRC since July 1, 1980. I have personal knowledge of the facts stated in this Declaration.

2. The Commission consists of a Chairman and eight additional members. *See* Va. Code Ann. § 28.2-102. The Commission's jurisdiction extends to all state-owned bottomlands in Virginia. Va. Code Ann. § 28.2-101. The Commission has powers to promulgate regulations necessary to carry out the provisions of law granting it authority. Va. Code Ann. § 28.2-103. Such regulations may be promulgated by the Commission only after complying with the requirements of Virginia Code Section 28.2-209. The staff of the Commission is not authorized to promulgate any policy or regulations on behalf of the Commission. The Commission exercises all policy-making functions within the scope of authority granted to it by law.

3. I have reviewed pages 22-24 and 61-84 of Maryland's Brief in Support of its Motion for Summary Judgment, and the accompany declarations of Doldon W. Moore and Richard Ayella. I have also reviewed the Maryland Board of Public Works document attached as Exhibit 12 to Mr. Moore's Declaration, entitled "Policy Clarifying Wetlands License

Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River, approved August 12, 1987."

4. This 1987 Maryland Policy was not reviewed or approved by the Commission. It was not submitted to the Commission for review because it did not reflect any policy to be accepted or promulgated by the Commission. It was discussed only at the staff level as a matter of administrative comity and convenience. It does not reflect the position of the Commission with respect to whether or not Maryland is legally authorized to impose particular requirements on Virginia applicants as a condition of constructing improvements in the Potomac River appurtenant to the Virginia shore. It was not advertised nor promulgated as a regulation or policy of the Commission.

5. Similarly, the VMRC staff correspondence attached to Mr. Ayella's declaration do not reflect the position or view of the Commission that Maryland has the legal right to block or restrict the efforts of any Virginia applicant to construct an improvement on the shore of the Potomac River. It has been the practice of the staff of the VMRC in recent years to forward Virginia permit applications to Maryland authorities for review when the project involves construction that extends into the Potomac River beyond the Virginia/Maryland line. Our correspondence in this regard has not been reviewed by the Commission. Because the VMRC's jurisdiction is statutorily limited to State-owned bottomlands, the VMRC does not exercise jurisdiction beyond the Virginia/Maryland line. The staff of the VMRC does not know whether Maryland has any legal authority to impose regulatory requirements on Virginia landowners. We have simply forwarded such applications to Maryland as a matter of administrative comity. The staff of the VMRC does not intend its transmittal letters to constitute any sort of recognition that Maryland has any greater legal authority than it does, and the staff is certainly not authorized to bind the Commission with respect to the recognition of any such authority.

6. To the best of my knowledge, other than the recent dispute concerning the Fairfax County Water Authority's offshore intake project, no dispute or controversy between Maryland and any Virginia applicant has come to the Commission's attention.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on: 28 December 2001

Robert W. Grabb

ROBERT W. GRABB

L-336

STATE OF MARYLAND
DEPARTMENT OF THE ENVIRONMENT
WATER MANAGEMENT ADMINISTRATION

WATERWAY CONSTRUCTION PERMIT

PERMIT NUMBER: 96-NT-0024/199661481

EFFECTIVE DATE: January 24, 2001

EXPIRATION DATE: January 24, 2004

PERMITTEE: Fairfax County Water Authority
8560 Arlington Boulevard, P. O. Box 1500
Merrifield, VA 22116
Attn: C. David Binning

IN ACCORDANCE WITH ENVIRONMENT ARTICLE §5-503(A) ANNOTATED CODE OF MARYLAND (1996 REPLACEMENT VOLUME), COMAR 26.17.04 AND THE ATTACHED GENERAL AND SPECIFIC CONDITIONS, Fairfax County Water Authority, ("PERMITTEE"), IS HEREBY AUTHORIZED BY THE WATER MANAGEMENT ADMINISTRATION ("ADMINISTRATION") TO CHANGE THE COURSE, CURRENT OR CROSS-SECTION OF WATERS OF THE STATE, IN ACCORDANCE WITH THE ATTACHED PLANS APPROVED BY THE NONTIDAL WETLANDS AND WATERWAYS DIVISION ON January 24, 2001, ("APPROVED PLAN") AND PREPARED BY HARZA Engineering Company AND INCORPORATED HEREIN, AS DESCRIBED BELOW:

Construction of a concrete water intake structure on the Potomac River, installed approximately 4 feet below the normal water level (EL. 180.8) and approximately 3 feet below the historic minimum water level (EL. 179.5). Also authorized is 725 linear feet of 120-inch diameter pipe extending from the bank of the Potomac River at the site of the existing Fairfax County Water Authority (FCWA) water intake to the proposed mid-river intake. The project site is located at the FCWA Potomac River facilities in Loudoun County, Virginia approximately 2000 feet upstream of Seneca Dam.

MD Grid Coordinates: N 448733 – E 702541
Contract No.: N/A

Amanda L. Sigillito, Chief
Nontidal Wetlands & Waterways Division

Attachments: Permit Conditions

cc: U.S. Army Corps of Engineers, Norfolk District
WMA Compliance Program w/ file

MD-MDE-23626

SPECIAL CONDITIONS

1) The mid-river intake project shall comply with the following requirements of the Potomac River Protection Act of 2000:

   (a) The mid-river intake must replace the existing shoreline intake already in use;

   (b) The mid-river intake cannot be used concurrently with the shoreline intake to be replaced;

   (c) The mid-river intake must be placed at least 30 inches below the water surface at the river's historic low flow;

   (d) The mid-river intake must not have the capacity to withdraw a greater quantity of water than can be withdrawn by the existing shoreline intake; and

   (e) The mid-river intake must incorporate a physical component that cannot be modified without the consent of the Maryland Department of the Environment and that will limit the capacity of the intake to 200 million gallons per day.

2) The mid-river intake shall not be marked by a buoy or other marker.

3) Construction in the river shall be performed using the Portadam method to de-water the construction site. Utilization of other methods to dewater the project area requires prior authorization by the Maryland Department of the Environment, Wetlands and Waterways Program (MDE, WWP). The Department will not authorize construction "in the wet."

4) The proposed project shall comply with the Turbidity Monitoring and Control Plan.

PERMIT CONDITIONS

PERMIT NO. 96-NT-0024/199661481

THE FOLLOWING CONDITIONS APPLY TO ALL ACTIVITIES AUTHORIZED BY PERMIT NO. 96-NT-0024/199661481.

1. Validity: Permit is valid only for use by Permittee. Permit may be transferred only with prior written approval of the Administration. In the event of transfer, transferee agrees to comply with all terms and conditions of Permit.
2. Initiation of Work, Modifications, and Extension of Term: Permittee shall initiate authorized activities within two (2) years of the Effective Date of this Permit or the Permit shall expire. Permittee may submit written requests to the Administration for (a) extension of the period for initiating work, (b) modification of permit, including the Approved Plan, or, (c) not later than 45 days prior to Expiration Date, an extension of the term. Requests for modifications shall be in accordance with applicable regulations and shall state reasons for changes, and shall indicate the impacts on nontidal wetlands, streams, and the floodplain, as applicable. The Administration may extend the Expiration Date at its sole discretion.
3. Responsibility and Compliance: Permittee is fully responsible for all work performed, and activities authorized by Permit shall be performed in compliance with Permit and Approved Plan. Permittee agrees that a copy of the Permit and Approved Plan shall be kept at the construction site and provided to its employees, agents and contractors. A person (including Permittee, its employees, agents or contractors) who violates or fails to comply with the terms and conditions of Permit, Approved Plan or an administrative order may be subject to penalties in accordance with §5-514, Environment Article, Annotated Code of Maryland (1996 Replacement Volume).
4. Failure to Comply: If Permittee, its employees, agents or contractors fail to comply with Permit or Approved Plan, the Administration may, in its discretion, issue an administrative order requiring Permittee, its employees, agents and contractors to cease and desist any activities which violate Permit, or the Administration may take any other enforcement action available to it by law, including filing civil or criminal charges.
5. Suspension or Revocation: Permit may be suspended or revoked by the Administration, after notice of opportunity for a hearing, if Permittee: (a) submits false or inaccurate information in Permit application or subsequently required submittals; (b) deviates from the Approved Plan, specifications, terms and conditions; (c) violates, or is about to violate terms and conditions of Permit; (d) violates, or is about to violate, any regulation promulgated pursuant to Title 5, Environment Article, Annotated Code of Maryland as amended; (e) fails to allow authorized representatives of the Administration to enter the site of authorized activities at any reasonable time to conduct inspections and evaluations; (f) fails to comply with the requirements of an administrative action or order issued by the Administration; or (g) does not have vested rights under Permit and new information, changes in site conditions, or amended regulatory requirements necessitate revocation or suspension.
6. Other Approvals: Permit does not authorize any injury to private property, any invasion of rights, or any infringement of federal, State or local laws or regulations, nor does it obviate the need to obtain required authorization or approvals from other State, federal or local agencies as required by law.
7. Site Access: Permittee shall allow authorized representatives of the Administration access to the site of authorized activities during normal business hours to conduct inspections and evaluations necessary to assure compliance with Permit. Permittee shall provide necessary assistance to effectively and safely conduct such inspections and evaluations.
8. Inspection Notification: Permittee shall notify the Administration's Compliance Program at least five (5) days before starting activities authorized by Permit and five (5) days after completion by calling the Baltimore Office at (410) 631-3510.
9. Sediment Control: Permittee shall comply with the approval from the Maryland Department of the Environment, Wetlands and Waterway Program for a sediment control plan specifying soil erosion control measures. The approved grading and sediment control plan shall be included in the Approved Plan, and shall be available at the construction site.
10. Federally Mandated State Authorizations:

    X Water Quality Certification: The Department has not reviewed the project for compliance with applicable State water quality standards. Because the one year review period provided for in Section 401 of the Federal Clean Water Act (33 U.S.C. §1341) has lapsed, the Department's opportunity to review the project with respect to the issuance of a water quality certification is deemed waived by operation of law.

    N/A Coastal Zone Consistency: This Permit constitutes official notification that authorized activities are consistent with the Maryland Coastal Zone Management Program, as required by Section 307 of the Federal Coastal Zone Management Act of 1972, as amended. Activities within the following counties are not subject to this requirement: Allegany, Carroll, Frederick, Garrett, Howard, Montgomery, and Washington.

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PERMIT CONDITIONS

PERMIT NO. 96-NT-0024/199661481

PAGE 3 of 3

11. Best Management Practices During Construction: Permittee, its employees, agents and contractors shall conduct authorized activities in a manner consistent with the Best Management Practices specified on the Approved Plan.
12. Disposal of Excess: Unless otherwise shown on the Approved Plan, all excess fill, spoil material, debris, and construction material shall be disposed of outside of nontidal wetlands, nontidal wetlands buffers, and the 100-year floodplain, and in a location and manner which does not adversely impact surface or subsurface water flow into or out of nontidal wetlands.
13. Temporary Staging Areas: Temporary construction trailers or structures, staging areas and stockpiles shall not be located within nontidal wetlands, nontidal wetlands buffers, or the 100-year floodplain except as encompassed in the Approved Plan.
14. Temporary Stream Access Crossings: Temporary stream access crossings shall not be constructed or utilized unless shown on the Approved Plan. If temporary stream access crossings are determined necessary prior to initiation of work or at any time during construction, Permittee, its employees, agents or contractors shall submit a written request to the Administration and secure the necessary permits or approvals for such crossings before installation of the crossings. Temporary stream access crossings shall be removed and the disturbance stabilized prior to completion of authorized activities or within one (1) year of installation.
15. Discharge: Runoff or accumulated water containing sediment or other suspended materials shall not be discharged into waters of the State unless treated by an approved sediment control device or structure.
16. Instream Construction Prohibition: To protect important aquatic species, activities within stream channels are prohibited as determined by the classification of the stream (COMAR 26.08.02.08): Potomac River is a Use I waterway; in-stream work may not be conducted from March 1 through June 15, inclusive, of any year.
17. Disturbance of Stream Channels: Motor driven construction equipment shall not be allowed within the stream channel except as encompassed in the Approved Plan or specifically authorized in writing by the Administration.
18. Instream Blasting: Permittee shall obtain prior written approval from the Administration before blasting or using explosives in the stream channel. A detailed blasting plan must be submitted to the MDE, WWP, for review and approval.
19. Minimum Disturbance: Any disturbance of stream banks, channel bottom, wetlands, and wetlands buffer authorized by Permit or Approved Plan shall be the minimum necessary to conduct permitted activities. All disturbed areas shall be stabilized vegetatively no later than seven (7) days after construction is completed or in accordance with the approved grading and sediment control plan.
20. Restoration of Construction Site: Permittee shall restore the construction site upon completion of authorized activities. Undercutting, meandering or degradation of the stream banks or channel bottom, any deposition of sediment or other materials, and any alteration of wetland vegetation, soils, or hydrology, resulting directly or indirectly from construction or authorized activities, shall be corrected by Permittee as directed by the Administration.

L-340

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,	*	No. 129, Original
Plaintiff,	*	Before Special Master
v.	*	Ralph I. Lancaster, Jr.
STATE OF MARYLAND,	*	
Defendant.	*	

* * * * * * * * * * * *

DEFENDANT'S ANSWERS TO
REQUESTS FOR ADMISSION

Pursuant to Case Management Order No. 7 and Rule 36 of the Federal Rules of Civil Procedure, Defendant State of Maryland, by its attorneys, hereby answers the requests for admission of Plaintiff Commonwealth of Virginia, and states as follows:

Request No. 1

On December 10, 1997, the Water Management Administration of the Maryland Department of Environment denied a waterway construction permit to the Fairfax County Water Authority (the "Authority") for the construction of an offshore drinking water intake appurtenant to the Authority's property on the Virginia shore of the Potomac River.

Answer

Maryland admits that the Water Management Administration ("WMA") of the Maryland Department of the Environment ("MDE") denied a waterway construction permit to the Fairfax County Water Authority ("the Authority") on December 10, 1997 for the construction of an offshore drinking water intake opposite the Authority's property on the

Virginia shore of the Potomac River. Maryland denies, however, that the intake is "appurtenant" to the Authority's property.

Request No. 2

Prior to December 10, 1997, several elected representatives to the Maryland General Assembly had informed the Water Management Administration that they were opposed to the issuance of a waterway construction permit to the Authority.

Answer

Maryland admits that, prior to December 10, 1997, more than a hundred Marylanders and Virginians, including several elected representatives of the Maryland General Assembly, had informed the WMA that they were opposed to the issuance of a waterway construction permit to the Authority.

Request No. 3

Among the elected representatives to the Maryland General Assembly who opposed the issuance of a waterway construction permit to the Authority were Del. Jean Cryor, Del. Adrienne Mandel, Del. Carol Petzold, Del. Henry Heller, Sen. Brian Frosh, Sen. Jean Roesser, Del. Mark Shriver, and Sen. Christopher Van Hollen.

Answer

Admitted.

Request No. 4

Attached as Exhibit 1 is a true and accurate copy of a letter dated May 8, 1997 from Del. Henry Heller to Maryland Department of Environment Secretary Jane Nishida ("Secretary Nishida").

Answer

Admitted.

Request No. 5

Attached as Exhibit 2 is a true and accurate copy of a letter dated May 19, 1997 from Del. Jean Cryor to Secretary Nishida.

Answer

Admitted.

Request No. 6

Attached as Exhibit 3 is a true and accurate copy of a letter dated May 19, 1997 from Del. Adrienne A. Mandel to Secretary Nishida.

Answer

Admitted.

Request No. 7

Attached as Exhibit 4 is a true and accurate copy of an internal memorandum from the Maryland Department of Natural Resources, sent in May 1997, concerning the Authority's offshore intake project.

Answer

Admitted.

Request No. 8

At a public informational hearing concerning the Authority's offshore intake project held on May 21, 1997, in Montgomery County, Maryland:

(a) Del. Cryor stated that she was opposed to the project and that "I'm certainly going to work to not have this happen."

(b) Sen. Roesser stated that "I think we should call a spade a spade" and that "this expanded intake accommodates Virginia's massive growth."

(c) Del. Petzold stated that she opposed the Authority's offshore intake project.

Answer

Admitted.

Request No. 9

Attached as Exhibit 5 is a true and accurate copy of a letter dated May 22, 1997, from Del. Cryor to Secretary Nishida.

Answer

Admitted.

Request No. 10

Attached as Exhibit 6 is a true and accurate copy of a letter dated May 29, 1997, from Del. Shelia Hixson to Maryland Governor Parris N. Glendening.

Answer

Admitted.

Request No. 14

Attached as Exhibit 7 are true and accurate copies of letters dated June 30, 1997, from Del. Cryor to, respectively, Secretary Nishida, J.L. Hearn (Director, Water Management Administration) and Terry Clark (Division Chief, Nontidal Wetlands and Waterways).

Answer

Admitted.

Request No. 15

Attached as Exhibit 8 is a true and accurate copy of a letter dated July 9, 1997 from Del. Cryor to Secretary Nishida.

Answer

Admitted.

Request No. 16

Attached as Exhibit 9 is a true and accurate copy of a letter to the editor that appeared in The Fairfax Journal on or about October 21, 1997.

Answer

After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny this request.

Request No. 17

Attached as Exhibit 10 is a true and accurate copy of a facsimile transmittal dated October 30, 1997, from Bob Taylor, Virginia Department of Health, to Terry Clark, Maryland Department of Environment, enclosing a letter dated October 29, 1997, from the Virginia Commissioner of Health to the General Manager of the Fairfax County Water Authority.

Answer

Maryland admits that Exhibit 10 contains a true and accurate copy of a facsimile transmittal dated October 30, 1997, from Bob Taylor, Virginia Department of Health, and admits that the October 29, 1997 letter from the Virginia Commissioner of Health to the General Manager of the Fairfax County Water Authority was part of this facsimile transmission. After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny the authenticity of the October 29, 1997 letter.

Request No. 19

On or about December 10, 1997, the Water Management Administration denied a waterway construction permit to the Authority for the offshore intake project.

Answer

Admitted.

Request No. 20

On December 11, 1997, MDE issued a press release, naming Quentin Banks as the

contact person, which stated in part: "In its notice of permit decision to FCWA, MDE said that the public need for a safe and adequate supply of drinking water may be reasonably accomplished using the existing intake on the Virginia shore of the Potomac River."

Answer

Admitted.

for permit issuance.

Request No. 23

Attached as Exhibit 11 is a true and accurate copy of a letter dated December 30, 1997, from Del. Cryor to Secretary Nishida.

Answer

Admitted.

Request No. 24

Attached as Exhibit 12 is a true and accurate copy of the Internet web page displayed by Del. Jean Cryor in 1998 at the site http://www.jeancryor.com, preceding her reelection as a Delegate to the Maryland House of Delegates.

Answer

Admitted.

Request No. 25

After the Water Management Administration denied a waterway construction permit to the Authority in December 1997, and prior to her reelection to the Maryland House of Delegates in November 1998, Del. Jean Cryor held herself out to the public as having "[s]topped Fairfax Country from building destructive in-take pipe/platform in middle of Potomac River."

Answer

Maryland admits that Delegate Cryor's website contained the above-referenced statement.

Request No. 26

Del. Jean Cryor has stated in press interviews that she believes that, through the

Authority's offshore intake project, Virginia is engaged in "modern day strip-mining" of the Potomac River.

Answer

After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny the precise wording of the above quotation. Maryland admits that Delegate Cryor has made statements to similar effect.

Request No. 27

Attached as Exhibit 13 is a true and accurate copy of Maryland Governor Parris N. Glendening's letter dated February 9, 1998 to John Mathwin.

Answer

Admitted.

Request No. 32

On February 12, 1998, Del. Cryor introduced a bill for first reading in the Maryland House of Delegates, HB 848, to prohibit the Maryland Department of Environment from issuing any permit allowing the construction of an offshore intake to withdraw water from the Potomac River.

Answer

Admitted.

Request No. 33

A true and accurate copy of HB 848 is attached as Exhibit 14.

Answer

Admitted.

Request No. 34

Attached as Exhibit 15 is a true and accurate copy a memorandum dated January 29, 1998 from Assistant Attorney General Adam Snyder to various officials at the Maryland Department of Environment.

Answer

Admitted.

Request No. 35

The document attached as Exhibit 15 accurately describes Assistant Attorney General Adam Snyder's conversation with Del. Cryor's aide, Katherine Smith.

Answer

Admitted.

Request No. 36

The Maryland Chamber of Commerce, the Potomac Electric Power Company (which provides electrical service in Maryland) and Alleghany [sic] Power (a Maryland utility), testified against Del. Cryor's bill, HB 848, before the Maryland House Committee on Environmental Matters on February 17, 1998.

Answer

Maryland admits that the Maryland Chamber of Commerce, the Potomac Electric Power Company, and Allegheny Power provided such testimony, but denies that the testimony took place on February 17, 1998.

Request No. 37

On March 9, 1998, the Maryland House Committee on Environmental Matters submitted an unfavorable report on Del. Cryor's bill.

Answer

Admitted.

Request No. 38

On or about March 11, 1998, Del. Cryor told The Washington Post that she would file the bill next year and that the bill was needed to keep the Fairfax County Water Authority from building its proposed offshore intake in the Potomac River.

Answer

Admitted.

Request No. 39

Attached as Exhibit 16 is a true and accurate copy of a letter dated March 18, 1998 from Del. Cryor to Secretary Nishida.

Answer

Admitted.

Request No. 40

Attached as Exhibit 17 is a true and accurate copy of a letter dated March 19, 1998 from Del. Cryor to Terry Clark.

Answer

Admitted.

Request No. 41

On or about February 5, 1999, Sen. Christopher Van Hollen introduced SB 582, entitled "Potomac River Protection Act," for first reading in the Maryland Senate.

Answer

Admitted.

BEST AVAILABLE COPY

Request No. 42

A true and accurate copy of SB 582, as amended by the Maryland Senate, is attached as Exhibit 18.

Answer

Admitted.

Request No. 43

SB 582 was passed by the Maryland Senate by a vote of 47-0 on April 11, 1999.

Answer

Admitted.

Request No. 44

On or about February 11, 1999, Del. Cryor introduced HB 615, entitled "Potomac River Protection Act," for first reading in the Maryland House of Delegates.

Answer

Admitted.

Request No. 45

A true and accurate copy of HB 615, as amended by the House of Delegates, is attached as Exhibit 19.

Answer

Admitted.

Request No. 46

HB 615 was passed by the Maryland House of Delegates by a vote of 138-0 on April 1, 1999.

Answer

Admitted.

Request No. 47

Although a conference committee resolved the minor differences in the two versions of the Potomac River Protection Act, the 1999 session of the Maryland General Assembly expired at midnight on April 11, 1999, before SB 582 could be passed.

Answer

Maryland admits that the conference committee report was adopted on April 11, 1999, that S.B. 582 was not enacted, and that the 1999 session of the Maryland General Assembly expired at midnight on April 11, 1999.

Request No. 48

Attached as Exhibit 20 is a true and accurate copy of a letter dated November 30, 1999 from the Virginia Attorney General, Mark L. Earley, to the Maryland Attorney General, J. Joseph Curran, Jr.

Answer

Admitted.

Request No. 49

Attached as Exhibit 21 is a true and accurate copy of a letter dated January 4, 2000 from General Curran to General Earley.

Answer

Admitted.

Request No. 50

On February 3, 2000, Del. Cryor introduced HB 395, entitled "Potomac River

Protection Act," for first reading in the Maryland House of Delegates.

Answer

Admitted.

Request No. 51

A true and accurate copy of HB 395, as amended by the Maryland House, is attached as Exhibit 22.

Answer

Admitted.

Request No. 52

On February 4, 2000, Sen. Christopher Van Hollen introduced SB 729, entitled "Potomac River Protection Act," for first reading in the Maryland Senate.

Answer

Admitted.

Request No. 53

A true and accurate copy of SB 729, as amended by the Maryland Senate, is attached as Exhibit 23.

Answer

Admitted.

Answer

Denied.

Request No. 55

The Washington Post, on February 18, 2000, accurately quoted Sen. Christopher Van Hollen when it reported: "'We see it as a quantity issue. . . . Maryland did not want to create the situation where Virginia would be able to drain the Potomac to fuel out-of-control development,' said Maryland state Sen. Christopher Van Hollen Jr. (D-Montgomery), who is sponsoring a bill that would limit the amount of water available through a new pipe."

Answer

Admitted.

Request No. 56

The Washington Post, on February 23, 2000, accurately quoted Sen. Christopher Van Hollen when it reported: "But Maryland lawmakers--who have long accused their Virginia neighbors of allowing rampant development to foul the Potomac and waste its water--say the measures are necessary to ensure that Fairfax County does not continue to pursue environmentally insensitive policies at the expense of the Potomac River. 'We want to prevent them from fueling more development on the Virginia side, which has been out of control in recent years and which will further pollute the water,' Van Hollen said."

Answer

Admitted.

Request No. 57

SB 729, as amended, and HB 395, as amended, were unanimously passed by the Maryland House and the Maryland Senate in April 2000.

Answer

Maryland admits that SB 729 was passed by a vote of 138-0 and that HB 395 was passed 45-0 in April 2000.

Request No. 59

The Washington Post, on March 31, 2000, accurately quoted Sen. Christopher Van Hollen when it reported: "The primary purpose of the amendment, he said, is to strengthen the hand of Maryland environmental officials in negotiations with Virginia. The original bill would have prevented the state from granting Virginia's permit and settling the lawsuit before it reaches the U.S. Supreme Court. 'I don't think Maryland wants to roll the dice on control over the Potomac River,' Van Hollen said, referring to a possible court fight."

Answer

Admitted.

Request No. 60

Attached as Exhibit 24 is a true and accurate copy of a letter dated April 18, 2000, from Sen. Van Hollen to Governor Glendening.

Answer

Admitted.

Request No. 61

Governor Glendening accepted Sen. Van Hollen's advice contained in his letter of April 18, 2000.

Answer

Maryland objects to the characterization of Senator Van Hollen's communication as "advice." Maryland admits that the Governor received a copy of the April 18, 2000 letter from Senator Van Hollen, and admits that the Governor signed Senate Bill 729.

Request No. 62

The Washington Post, on May 18, 2000), accurately reported that: "Maryland Gov. Parris N. Glendening said yesterday he will veto a bill that would have blocked efforts by Virginia water authorities to extend an intake pipe into the center of the Potomac River until environmental studies are complete--a process that could take years. Instead, Glendening (D) plans to sign a competing measure today that would allow Virginia to build the pipe upon approval by the Maryland Department of the Environment."

Answer

Admitted.

Request No. 63

Governor Glendening vetoed HB 395, and signed SB 729 on May 18, 2000, and SB 729 is now recorded at 2000 Md. Acts c. 557.

Answer

Admitted.

Request No. 64

The Washington Post, on May 31, 2000, accurately quoted Sen. Van Hollen when it reported: "'Virginia has been a very reluctant partner in environmental issues. We are concerned that the real interest in Virginia is to grab as much water as they can,' said Maryland Sen. Christopher Van Hollen Jr. (D-Montgomery)."

Answer

Admitted.

Request No. 65

On June 6, 2000, the Montgomery County Journal accurately reported the following statement by Michael E. Morrill, Communications Director for Governor Glendening: "Virginia has taken 'the wrong side of every environmental issue' in its dealings with Maryland, Morrill said."

Answer

Admitted.

Request No. 66

On November 6, 2000, a final decision maker appointed by the Maryland Department of Environment issued a final decision on behalf of MDE, directing that a waterway construction permit be issued to the Fairfax County Water Authority, with the permit conditions imposed by § 1(b)(2)(ii) of 2000 Md. Acts c. 557 (SB 729).

Answer

Maryland admits that, on November 6, 2000, a final decision maker appointed by

MDE issued a final decision on behalf of MDE directing that a waterway construction permit be issued to the Authority with permit conditions, including those imposed by § 1(b)(2)(ii) of 2000 Md. Laws ch. 557.

Request No. 67

In his November 6, 2000 Final Decision, the final decision maker for MDE declined to address the Authority's argument that it was entitled to construct the offshore intake in the Potomac River based on Article VII of the Compact of 1785, Clause IV of the Black-Jenkins Award, and Article VII, § 1 of the Potomac River Compact of 1958.

Answer

Maryland admits that, having ruled in favor of the Authority on grounds of Maryland law, the final decision maker found "it unnecessary to address the Authority's argument that the Compact of 1785 compels the Department to allow construction of the intake." Maryland denies, however, any implication that the final decision maker did this against the wishes of the Authority, or that the final decision maker needed to address this argument.

Request No. 68

On November 7, 2000, Governor Glendening's office was informed that Virginia would not dismiss this case, notwithstanding MDE's final decision of November 6, 2000.

Answer

After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny this request.

Request No. 69

On November 7, 2000, Governor Glendening's office, after learning that Virginia

would not dismiss this action, issued a press release stating that the Governor continued to oppose the Authority's offshore intake project.

Answer

Maryland admits that on November 7, 2000, the Governor's Office issued a press release stating that "Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe." After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny whether this press release was issued after learning that Virginia would not dismiss the Supreme Court action.

Request No. 70

The press release issued by Governor Glendening's office on November 7, 2000, stated, in part:

> I have requested the Department of Environment and the Attorney General to aggressively pursue every option to ensure the Potomac River is protected and Maryland's high standards of stewardship are maintained.
> We have serious concerns that extension of the intake pipe would cause irreparable environmental damage by encouraging sprawl and seriously compromise water quality for thousands of residents in both Virginia and Maryland.
> . . .
> Under a 1632 land grant by King Charles I of England, Maryland owns the entire Potomac River. I firmly believe that Maryland's historic stewardship of the Potomac River is in the best interest of the both [sic] states, the environment and future generations.

Answer

Admitted.

Request No. 71

The Washington Post, on November 8, 2000, accurately quoted Sen. Van Hollen when

it reported: "'We don't want Virginia to willy-nilly withdraw large amounts out of the Potomac to fuel development on its side of the river,' said Sen. Christopher Van Hollen Jr. (D-Montgomery), one of the law's authors. 'We'd have the key to physically adjust it.'"

Answer

Admitted.

Request No. 72

In December 2000, the Maryland Department of Environment filed, in the Baltimore City Circuit Court, a petition for judicial review of its own final decision approving the issuance of a waterway construction permit to the Authority.

Answer

Admitted.

Request No. 73

Governor Glendening approved the decision by MDE to appeal to the Baltimore City Circuit Court the final decision approving the issuance of a waterway construction permit to the Authority.

Answer

Admitted.

Request No. 74

On April 19, 2001, on the radio program "Ask the Governor" on WTOP Radio, 1500 AM, 107.7 FM, in the Washington Metropolitan area, Governor Glendening was interviewed and responded to questions. At approximately 10:55 a.m., Governor Glendening, in reference to the Potomac River and his dealings with Virginia Governor James S. Gilmore, III, stated as follows:

> We just have fundamental differences, and I think the important thing is, just what are those differences all about. I mean a good example here is about the use of the River. Obviously we want to be good neighbors but if you're going to use the water from the River only to permit more sprawl, which is having this huge environmental impact, including on the Potomac River. I mean, flying over -- if anyone doubts this, fly over the Potomac River and, as you come up from the Bay and you start approaching the Washington area, what you will see is immense silting occurring, primarily from the Virginia side where the construction and all is going on and, yes we want a prosperous society but I remind everyone now -- you know in Maryland we have probably the strongest economy in the country, just about. I mean when you think about what's happening in our economy and we're doing it in an environmentally sensitive way. So, all I'm saying is, we'll give you water but don't pollute the River.

Answer

After making reasonable inquiry, the information known to Maryland is insufficient to enable Maryland to admit or deny this request the accuracy of the alleged statement. Maryland infers from the lengthy quote above that Virginia has obtained a transcript of the above-referenced program. Should Virginia provide a copy to Maryland, Maryland may be able to give a more definite answer.

Request No. 75

Until it filed its opposition in April 2000 to Virginia's motion for leave to file the bill of complaint in this action, Maryland had never contended that Virginia had relinquished its right to contest Maryland's authority to issue permits for withdrawals of water from the Potomac River or for the construction of improvements appurtenant to the shore of the Potomac River.

Answer

Denied.

Request No. 76

In the administrative case styled *In the Matter of Fairfax County Water Authority*, Office of Administrative Hearings, Case No. 98-MDE-WMA-116-044 (the "Administrative Case"), the Maryland Department of Environment, represented by the Office of the Maryland Attorney General, submitted several briefs and memoranda setting forth MDE's position concerning the Fairfax County Water Authority's claims under Article VII of the Compact of 1785, Clause IV of the Black-Jenkins Award, and Article VII, section 1 of the Potomac River Compact of 1958.

Answer

Admitted.

Request No. 77

MDE never contended in the Administrative Case that the Authority had relinquished its right to contest Maryland's authority to issue permits for withdrawals of water from the Potomac River, or for the construction of improvements appurtenant to the shore of the Potomac River.

Answer

Denied.

Request No. 78

MDE never contended in the Administrative Case that Virginia had relinquished its right to contest Maryland's authority to issue permits for withdrawals of water from the Potomac River, or for the construction of improvements appurtenant to the shore of the Potomac River.

L-364

Answer

Denied.

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CARMEN M. SHEPARD
Deputy Attorney General

MAUREEN MULLEN DOVE
ANDREW H. BAIDA*
RANDOLPH STUART SERGENT
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M. ROSEWIN SWEENEY
ADAM D. SNYDER
Assistant Attorneys General
2500 Broening Highway
Baltimore, MD 21224
(410) 631-3034

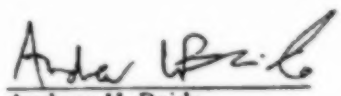
Attorneys for Defendant
State of Maryland

*Counsel of Record

L-365

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of September, 2001, a copy of the foregoing answers to requests for admission was served by electronic mail and federal express on Frederick S. Fisher, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219; and Stuart A. Raphael, Esq., Hunton & Williams, 1751 Pinnacle Drive, Suite 1700, McLean, Virginia.



Andrew H. Baida
Assistant Attorney General

L-366

HENRY B. HELLER
MEMBER
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON HEALTH AND HUMAN RESOURCES
CHAIRMAN, JOINT COMMITTEE ON FEDERAL RELATIONS
CHAIRMAN, JOINT COMMITTEE ON MANAGEMENT OF PUBLIC FUNDS
CHAIRMAN, MONTGOMERY COUNTY DELEGATION
39TH LEGISLATIVE DISTRICT
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HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

May 8, 1997

Ms. Jane Nishida
Secretary
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Dear Secretary Nishida:

Enclosed is a letter I received from my constituent's Mr. and Mrs. West, regarding the Fairfax County Water Authority Mid-River Intake project. As outlined in their letter they have grave concerns regarding this project.

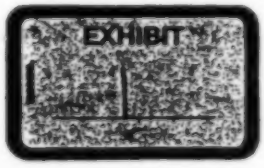
In order to assist the West's, I am requesting that you review their letter and provide me with an explanation so that I may respond to them. In addition to the environmental concerns, I am also interested in why the state of Maryland would be establishing a less restrictive building environment on the Virginia side of the river for competition against Maryland builders in Montgomery and Frederick Counties.

I look forward to your response. If I can be of assistance, please feel free to contact me at any time.

Sincerely,

Henry B. Heller

Enclosure



L-367

97-0889

Legislative District 15
Montgomery County

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Potomac, Maryland 20854-2101
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FAX (301) 424-7718

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Transportation Subcommittee

Annapolis Office:
219 Lowe House Office Building
Annapolis, Maryland 21401
(301) 858-3052
(410) 841-3052

May 19, 1997

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

Dear Secretary Nishida:

As you know, on Wednesday, May 21, in Montgomery County, the Maryland Department of Environment is holding a hearing regarding a request by Fairfax County, Virginia, to install a new water intake pipe in the Potomac River. The pipe is to be located near Seneca. Presently, Virginia draws its river water using a shore line pipe. The new pipe will be in the middle of the river. It will be capable of taking at lease double the amount of water presently removed. The new pipe does not automatically remove usage of the shore line pipe

In April, I was contacted about the new pipe by a Montgomery County high school teacher with a strong interest in the environment. Upon hearing from Mr. John Mathwin, I contacted the Department of Environment. The staff of the department has been most courteous and responsive and agreed to schedule a hearing. As I said to you when we spoke on Friday, May 16, I am concerned about the pipe and its impact on the environment as well as my concerns about the river being used as a resource for Virginia's continuing economic development.

It has become clear to me that Virginia's planners regard the Potomac River as key to their burgeoning development. Maryland has taken a view, particularly regarding the enlightened Smart Growth plan, to team economic development and careful environmental planning. However, Virginia does not appear to have the same thoughtful view. As Virginia continues to develop and build in the northern part of the Commonwealth, we in Maryland, I believe, will continue to experience tremendous pressure, both for jobs and for changing our own protective environmental stand.

It appears time for Maryland to look at the Potomac River and its place in the growing regional economy. Do we want to continue to exploit the river for the sake of Virginia's development?

I have asked for a meeting with Governor Glendening to discuss the river.

All my best,

Jean Cryor

EXHIBIT
1 2

MDE00475

L-368

Member

COMMERCE AND GOVERNMENT MATTERS COMMITTEE
STATE GOVERNMENT-CIVIL RIGHTS SUBCOMMITTEE
MONTGOMERY COUNTY DELEGATION
COUNTY AFFAIRS COMMITTEE
VICE-CHAIR

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

ADRIENNE A. MANDEL
MONTGOMERY COUNTY
LEGISLATIVE DISTRICT 19

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13816 NORTH GATE DRIVE
SILVER SPRING, MARYLAND 20906-2215
(301) 460-0293

May 19, 1997

RECEIVED
MAY 22 1997
OFFICE OF THE SECRETARY
MD DEPT OF THE ENVIRONMENT

The Honorable Jane T. Nishida, Secretary
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Dear Madam Secretary:

The Fairfax County, Virginia, Water Authority has petitioned the Department of the Environment for permission to build a Potomac River Intake Project to draw 50 million gallons of water from the river every day. I have serious concerns both about the sediment erosion problems of the proposed construction, and the long term effect of the entire project.

Unfortunately, a schedule conflict prevents my being present at the Public Hearing scheduled for May 21, 1997. Therefore, I would appreciate your including these comments as part of the public record.

Although it would be "neighborly" to accommodate Virginia's request and thereby provide Virginia residents with cleaner water at lower costs, we must ensure that environmental concerns and Maryland's residents needs are not compromised. Additionally, a larger intake might result in Virginia drawing more water from the river in the future. The allocation issue and the propensity for increased capacity to foster new development is an issue that merits examination. It appears that Fairfax County's need for the new Mid River Intake may be directly related to Virginia's watershed development policies which lack many of the water quality protection safeguards Maryland mandates. The construction of the Lowes Island Golf Course is only one example. Such disregard for sound environmental management practices should not be rewarded, especially at the expense of Maryland's residents.

I urge your rejection, based on environmental, economic and aesthetic consequences, of the Fairfax County, Virginia, Water Authority application to construct a new water intake pipeline in the middle of the Potomac River.

Sincerely,

Adrienne A. Mandel

Adrienne A. Mandel

EXHIBIT 3

FCWA01538

L-369

From: Greg Golden
To: LBYRNE
Subject: Heads up on a high visibility project

A MDE Nontidal Wetlands and Waterways public notice worthy of special attention is currently open:

The notice is dated 5-1-97
96-MT-0024 199661481
Fairfax Co. Water Authority
construction of intake structure for water supply
located in the Potomac R., Mont. Co.
opposite mouth of Seneca Creek

This project review has a long history
DNR commented (through me) to MDE back in Dec. 1995.
impact minimization and boating safety were main concerns.
my records show heritage had no concerns at that time

The project is on a new public notice, closing 6-4-97. A copy was sent to you 5-1-97. MDE probably wants to resolve this quickly.
This project has become somewhat controversial with the public, and a public hearing will be held 5-21-97. Editorials and letters have appeared in the local paper from unhappy Mo. Co residents. The project is to supply better water for Fairfax Co. residents. It has the potential to be a very hot issue.
I put a phone message in to Karene, in case new mussel field data may indicate a need to comment. Be aware that we have already stated in writing that there is no heritage concern, so we should be precise if we need to bring anything else up. If we will make any more comments, we need to let MDE know soon that they are coming.

I will be commenting with some clarification on minimization of river bottom disturbance, and detailed discussion on boating safety issues.

I will continue to try to reach Karene. If it appears Heritage will want to make any comments, we should discuss it within a week or so.
thanks
greg

CC: TAWES-PO2.KMOTIVANS

MDE01715

EXHIBIT
14

L-370

97-093

Legislative District 15
Montgomery County

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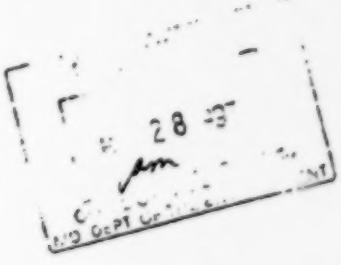
HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Transportation Subcommittee

Annapolis Office:
219 Lowe House Office Building
Annapolis, Maryland 21401
(301) 858-3052
(410) 841-3052

May 22, 1997



Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

Dear Secretary Nishida:

Thank you for holding the informational hearing on the Fairfax County Water Authority's request to install a new water intake pipe 725 feet into the Potomac River. Mr. Terry Clark, Division Chief, Nontidal Wetlands and Waterways, did an outstanding job running the hearing. He provided time for presentations and kept the hearing moving so that all those desiring to speak were able to express their views.

After listening to all the speakers, I have come to several conclusions.

1. I am formally requesting an environmental impact study be done for the Potomac River.

2. I am requesting that a second look be given to the permit process of the U. S. Corps of Engineers regarding this project. I am not confident that the permit process used follows the letter and spirit of the law. The nearest neighbor to the project, the Potomac Conservancy, was not notified of the permit request, Paul Rosa, Executive Director, stated. *The Sentinel* newspaper, with its limited circulation, does not allow for the kind of circulation needed to inform the citizens of Montgomery County.

3. It is apparent that if Maryland allows this pipe and 30 foot platform to be constructed, the river will be changed forever. We heard testimony of the need for platform lights and buoys to alert those using the river. Obviously, this intake pipe will change the use and appearance of the Potomac River. A spokesperson for the Washington Suburban Sanitary Commission, present at the hearing, stated he expected the WSSC will may be looking for a mid-river pipe and platform also.

It appears obvious the money that Virginia is proposing to spend to build the pipe could better be spent to monitor and maintain the current shoreline pipe.

As you know, I am very concerned about the use of the Potomac River by Fairfax and other Virginia counties because of their economic development and explosive growth. Virginia's future economic growth impacts directly on Maryland. The stresses on the Maryland economy are in many way directly caused by Virginia's vigorous growth.

It is difficult for me to understand why Maryland would change the river permanently, sacrifice its scenic beauty and recreational potential, and ignore the advice of environmentalist for the sake of assisting Virginia's uncontrolled growth.

Again, thank you for your assistance and the fine work of your department.

All my best,

Jean B. Cryer

L-372

36:245

SHEILA ELLIS HIXSON

37TH LEGISLATIVE DISTRICT
MONTGOMERY COUNTY

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[illegible]
SILVER SPRING, MARYLAND 20904
(301) 384-6739

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

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TOLL FREE FROM WASHINGTON AREA
(301) 858-3027

May 29, 1997

The Honorable Parris Glendening
State House
Annapolis, MD 21401-1991

JUN 05 97

Dear Governor Glendening:

I want to congratulate you on your efforts to restore 60,000 acres of wetlands lost in the state due to growth and suburban sprawl. Your administration has made the environment a central focus and I certainly appreciate that. This is also the reason why I am bringing to your attention a disturbing piece of information.

The Fairfax County Water Authority has petitioned Maryland for permission to build a mid-river intake. The intake would be used to "augment" their present supply which comes from a station on the Virginia shoreline. Apparently, Virginia is forced to undertake this project because of the construction of two Golf Courses and other projects along the Sugarland Run watershed.

I strongly feel that Maryland should not grant this permission for various reasons. The new intake structure would mar a beautiful section of the Potomac River permanently. The project would degrade the quality of water Maryland gets from the Potomac for the duration of the construction project. We will also be allowing Virginia to continue to degrade the environment.

I would appreciate if you will look into this matter. Thank you.

Sincerely,

Sheila E. Hixson

Sheila E. Hixson

SEH:snq

MDE00166

EXHIBIT
16

L-373

[redacted]

cc: Dean

Legislative District 15
Montgomery County

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HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Transportation Subcommittee

Annapolis Office:
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(301) 858-3052
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June 30, 1997

RECEIVED
OFFICE OF THE SECRETARY
MD DEPT OF THE ENVIRONMENT

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

Dear Secretary Nishida:

May I add my congratulations to those applauding the fine work of you and your department regarding the proposed intake pipe in the Potomac River.

This is a time to be proud of the dedication of you and the staff of your department in encouraging comments and ideas from the public regarding the future of this wild and scenic waterway. And that upon gleaning these facts that you chose to reject the granting of a permit to allow this mid-river pipe.

I know the material that was generated from people who love the river was most helpful to you in making this wise decision. But, important to all of us as we look toward celebrating the Birth of our Nation, is that the request for an information hearing was acted upon quickly and that the citizens of Maryland were listened to with attention and respect by their government.

This is a good day for all of us.

Again, thank you for all the kindness and patience you have personally extended to me during this process. I am most grateful for your responsiveness.

MDE01276

Sincerely,

Jean B. Cryor

EXHIBIT
7

L-374

Legislative District 15
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HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Transportation Subcommittee

Annapolis Office:
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Annapolis, Maryland 21401
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(410) 841-3052

June 30, 1997

- 1 1997

Mr. J. L. Hearn
Director
Water Management Administration
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Mr. Hearn:

May I congratulate you and your department on the fine work done regarding the intake pipe in the middle of the Potomac River.

Your letter of June 16 and the following letter to Fairfax County regarding the reasons for turning down the request for a permit brought welcome news.

I know many of the people who love the Potomac River are grateful to you and your department for the thoughtful way that you handled this matter.

I am sure that we have not heard the end of the need for additional river water to meet Virginia's economic growth. I know that you share my concern that this growth, which puts much pressure on Maryland's environment, is met with careful responses.

Again, thank you.

Sincerely,

Jean B. Cryor

L-375

RECEIVED

JUL 1

Legislative District 15
Montgomery County

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HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

[redacted]
Transportation Subcommittee

Annapolis Office:
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June 30, 1997

Mr. Terry Clark
Division Chief
Nontidal Wetlands and Waterways
Department of the Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Mr. Clark:

May I congratulate you on the fine work done by you and your department during the intake pipe in the Potomac River debate.

Your responsiveness and courtesy to all, I know, made this process easier and better for everyone involved.

Obviously, I am delighted with the outcome of the decision not to grant a permit at this time. Such a fine decision certainly would not have happened without your attention to the question of public interest.

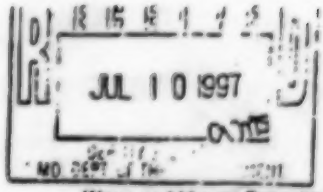
Again, congratulations.

Sincerely,

Jean B. Cryor

MDE00387

L-376



gislative District 15
Montgomery County

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HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Transportation Subcommittee

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July 9, 1997

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

RE: FCWA Permit Application for the Potomac River intake pipe

Dear Secretary Nishida:

I do not expect you to respond to rumors. However, my understanding is that Fairfax County Water Authority people have met with members of your department. My concern is that a compromise may be sought and reached that would allow a permit for a new intake pipe.

It is easy to understand that the Fairfax County Water Authority would attempt to change your department's decision. If there is to be any change from the stance taken by your department in the July 16 letter from J. L. Hearn, I would appreciate knowing as soon as possible.

All my best,

Jean

FCWA01480

EXHIBIT 8

THE FAIRFAX JOURNAL
Tuesday, October 21, 1997
Letter to the Editor

Maryland water belongs there

Fairfax County residents don't know it, but Maryland has just cut your water off.

Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Roesser and P.J. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.

Maryland's authority over the Potomac goes back to 1632 and the Maryland Charter, granted by King Charles I to Lord Baltimore. There are three strong reasons why Montgomery Countians oppose the Fairfax request:

- Increasing Fairfax water withdrawals from 100 to 300 million gallons per day, in a drought year, would convert the Potomac into a dry gulch.
- Why should Maryland, prudent in passing "smart growth" and "rural legacy" programs to reduce pollution from suburban sprawl, give more water to Fairfax County, which has promoted development with inadequate environmental controls.
- Why should Maryland reward Virginia with more water when Virginia is pursuing a predatory milk "dumping" practice that is bankrupting Maryland dairy farmers?

Maryland would like to talk to Virginia leaders who want joint action by the two states to work out problems on the Potomac, without throwing out the Maryland Charter and the U.S. Constitution.

JOHN C. "RUFUS" WEBB Jr.
Gaithersburg, Md.

EXHIBIT
1

L-378

facsimile
TRANSMITTAL

to:	Terry Clark
fax #:	410-631-8047
re:	Potomac Mid-River Intake Project
date:	October 30, 1997
pages:	2, including this cover sheet.

I am faxing a copy of the signed letter concerning the above subject.

Thank you.

Bob Taylor
Virginia Department of Health
Office of Water Programs
Division of Water Supply Engineering
(804) 786-1767

From the desk of...

Elizabeth Crocker
Executive Secretary
Division of Water Supply Engineering
1300 East Main Street Room 109
Richmond, Virginia 23219

(804) 371-2845
Fax: (804) 786-5567

EXHIBIT
10

MDE00097

L-379

COMMONWEALTH of VIRGINIA

Department of Health
P O BOX 2448
RICHMOND, VA 23218

RANDOLPH L. GORDON, M.D., M.P.H.
COMMISSIONER

TDD 1-800-828-1120

October 29, 1997

Mr. Charlie C. Crowder Jr.
General Manager
Fairfax County Water Authority
8560 Arlington Boulevard
Merrifield, Virginia 22116-0815

Dear Mr. Crowder:

SUBJECT: Potomac Mid-River Intake Project

This letter is to confirm our position on the proposed mid-river intake on the Potomac River with respect to water quality and public health. It has long been the policy of the Virginia Department of Health that each waterworks use the best quality raw water source available. In fact, both the Virginia and national drinking water regulations are predicated on this assumption.

The use of a mid-river raw water intake has many water quality and public health advantages over the continued use of the existing shoreline intake. Of particular importance, is the inescapable fact that the water near the center of such a large river is not nearly as susceptible to shoreline sources of contamination. These contamination sources include everything from urban and agricultural storm runoff to accidental discharges from such occurrences as pipeline breaks or vehicle accidents. The water at mid-river will also be of more consistent quality making it easier and more economic to treat. With our growing concern about treatment resistant pathogenic organisms such as Giardia and Cryptosporidium, it is even more critical that the best quality water sources be used.

We, at the Virginia Department of Health, consider the move to a mid-river water intake to be an essential public health initiative for the more than one million Virginians and their visitors who use Fairfax County Water Authority drinking water on a daily basis. We commend the FCWA for its insight in identifying such a simple solution to the increasingly complex problem of providing the safest possible drinking water to its customers.

Sincerely,

Randolph L. Gordon, M.D., M.P.H.
Commissioner

VDH VIRGINIA DEPARTMENT OF HEALTH
Protecting You and Your Environment

L-380

1/6 Done. cc: Hearn

Legislative District 15
Montgomery County

District Office:
11700 Ambleside Drive
Potomac, Maryland 20854-2101
(301) 762-7993
FAX (301) 424-7718

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee
Tax and Revenue

Annapolis Office:
219 Lowe House Office Building
Annapolis, Maryland 21401
(301) 858-3052
(410) 841-3052

December 30, 1997

Secretary Jane T. Nishida
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224-6612

ECI

Dear Secretary Nishida:

Congratulations to your and your staff on the brilliant work you did regarding the application of the Fairfax County Water Authority to construct a 300 million gallon per day capacity intake pipe 600 to 725 feet into the Potomac River.

I know the citizens who enjoy the Potomac are grateful for your tenacity.

If there is anything I can do to help you to continue to protect the river, please let me know.

Sincerely,

Jean

MDE01198

EXHIBIT 11

e-mail address: Jean_Cryor@house.state.md.us

L-381

Reelect Jean Cryor

To the Maryland House of Delegates

Tested by Experience.

Recognized for Accomplishment.

A strong supporter of our schools!

Reelect

Jean Cryor

To The Maryland House of Delegates

EXHIBIT 12

She's a recognized leader in fighting the Baltimore Football Stadium

Schools not Stadiums!

- Helped win record school construction funding, plus $10 million for Montgomery's "at risk" and ESOL students
- Sponsored successful education reform for accountability, safer classrooms, isolating the disruptive students, funding for training teachers and principals to help "at risk" students.
- Fought for Campaign Reform. Common Cause rating 100%
- Stopped Fairfax Country from building destructive in-take pipe/platform in middle of Potomac River. Sponsored landmark Potomac Conservancy Law.
- Sought sound barriers along the Beltway.
- Supports HMO's being responsive to patients by having physicians make medical decisions.
- Will encourage experienced teachers to return to Maryland classrooms by raising ceiling on teaching hours without jeopardizing pension.

Vote to Return Jean Cryor to the House of Delegates!

- Successfully reduced Maryland's high personal income tax. Will continue to reduce it. Will work to eliminate high taxes that drive away new business. Jean Cryor is endorsed by the Montgomery County Chamber of Commerce, Maryland Chamber, MBRG
- Delegate Jean Cryor is the only Montgomery legislator--and one of seven across the state--named to the 1998 Honor Roll of the Action for the Homeless, The Maryland Food Committee.
- Delegate Jean Cryor worked to secure $700,000 for the Germantown Cultural Arts Center, the first substantial state funding for District 15.
- Wrote nation's first state legislation to require photographs of children abducted by strangers to be posted in state buildings.

L-383

Biography of Jean Cryor

Jean Cryor serves on the boards of the Writers Center, Potomac Friends of the Library, Potomac Theatre Company. Before being elected to the House of Delegates, Jean Cryor was elected President of the West Montgomery County Citizens Association, to the board of the Montgomery Press Association. The Potomac Chamber of Commerce named her Citizen of the Year. She was an editor and publisher with the Gazette Newspapers.

As a young mother, suddenly widowed, Jean Cryor experienced the challenges of raising a family alone. Today she has three successful grown daughters and a wonderful grandson. She brings that experience to the decisions made in the Legislature.

Home Address:

11700 Ambleside Drive

Potomac, MD 20854

(301) 762-7993

Fax: (301) 424-7718

e-mail: cryor@mindspring.com

By Authority of Friends of Jean Cryor, Elie Pisarra, Treasurer

L-384

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

PARRIS N. GLENDENING
GOVERNOR

ANNAPOLIS OFFICE
STATE HOUSE
100 STATE CIRCLE
ANNAPOLIS, MARYLAND 21401
(410) 974-3901

WASHINGTON OFFICE
SUITE 311
444 NORTH CAPITOL STREET N.W.
WASHINGTON, D.C. 20001
(202) 638-2271

TDD (410) 333-3958

February 9, 1998

Mr. John Mathwin
13515 Crispin Way
Rockville MD 20853

Dear Mr. Mathwin:

Thank you for your letter regarding Fairfax County's proposal to construct a mid-river water intake on the Potomac River. I am pleased that the State of Maryland was able to address your concerns and protect this nationally important natural resource.

The State reached its decision to deny authorization of this project by considering all the information submitted by the Fairfax County Water Authority. Based on the evidence provided, I decided that the public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake.

Thank you again for your letter of support. If you have any further questions concerning this project, please contact Mr. J.L. Hearns, Director, Maryland Department of the Environment, Water Management Administration, at (410) 631-3567.

Sincerely,

Parris N. Glendening
Governor

cc: J.L. Hearns, Director, Water Management Administration, Department of the Environment

EXHIBIT
13

MDE00085

L-385

HOUSE BILL 848

Unofficial Copy
M1

1998 Regular Session
8lr0632

By: Delegates Cryor, Faulkner, Marriott, Shriver, Beck, Ciliberti, Stocksdale, Valderrama, Petzold, Leopold, R. Baker, and Dembrow
Introduced and read first time: February 12, 1998
Assigned to: Environmental Matters

A BILL ENTITLED

AN ACT concerning

Potomac River - Water Removal

FOR the purpose of prohibiting the Maryland Department of the Environment from issuing a permit to construct, reconstruct, or change certain devices, structures, or apparatus that facilitate the removal of water from off shore of the Potomac River; making certain stylistic changes; and generally relating to water removal from the Potomac River.

BY repealing and reenacting, with amendments,
Article - Environment
Section 5-504
Annotated Code of Maryland
(1996 Replacement Volume and 1997 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - Environment

5-504.

(A) (1) A person shall obtain a permit from the Department to construct, reconstruct, change, or make an addition to any conduit, pipeline, wire cable, trestle, or other device, structure, or apparatus in, under, through, or over the bed or waters of the Potomac River.

(2) The permit is obtained upon written application to the Department. Obtaining, using, and holding this permit is subject severally to the provisions concerning permits found elsewhere in this subtitle.

(B) THE DEPARTMENT MAY NOT ISSUE A PERMIT TO CONSTRUCT, RECONSTRUCT, CHANGE, OR MAKE AN ADDITION TO ANY CONDUIT, INTAKE PIPE, WIRE CABLE, TRESTLE, OR OTHER DEVICE, STRUCTURE, OR APPARATUS THAT WILL FACILITATE THE REMOVAL OF WATER FROM OFF SHORE OF THE POTOMAC RIVER.

EXHIBIT 14

L-386

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 1998.

L-387

OFFICE OF THE ATTORNEY GENERAL
MARYLAND DEPARTMENT OF THE ENVIRONMENT
2500 Broening Highway
Baltimore, Maryland 21224
(410) 631-3034

EXHIBIT 15

MEMORANDUM

TO: Dane Bauer
Diane Shaw
Gary Setzer
Terry Clark

Privileged & Confidential
Attorney-Client Communication

FROM: Adam Snyder
Assistant Attorney General

DATE: January 29, 1998

RE: Conversation With Delegate Cryor's Office Regarding Fairfax County Water Authority Case

On January 28, 1998, I spoke with Katherine Smith of Delegate Cryor's office about the Fairfax County Water Authority case. Ms. Smith told me about the bill Del. Cryor had introduced (8lr0632) that would bar MDE from issuing any permit that will "facilitate the removal of water from the center of the Potomac River." Ms. Smith ask that I lobby MDE to support the bill. I told Ms. Smith that, because the bill raised primarily policy issues -- i.e., whether mid-river intakes should be allowed -- my opinion as an attorney would not be particularly persuasive.

I informed Ms. Smith that Fairfax County had requested an administrative hearing on the denial of their waterway construction permit application. She felt that the pendency of that case would tend support passage of a bill because it would help MDE win the contested case. I told her that, while enactment of the bill would undoubtedly enter into the case in some form, I questioned whether the bill would have retroactive effect. Ms. Smith asked that I provide her with a copy of MDE's correspondence granting Fairfax County's request for a contested case hearing. Unless directed otherwise, I will send Del. Cryor a copy of the correspondence granting the contested case hearing when I receive it.

RECEIVED

L-388

Legislative District 15
Montgomery County

District Office:
11700 Ambleside Drive
Potomac, Maryland 20854-2101
(301) 762-7993 FAX (301) 424-7718

J
cc: Hearn, Shau

Ways and Means Committee

Annapolis Office:
219 Lowe House Office Building
Annapolis, Maryland 21401
(301) 858-3052

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

March 18, 1998

RECEIVED
MAR

Ms. Jane T. Nishida
Secretary
Maryland Department of
Environment
2500 Broening Highway
Baltimore, MD 21224

Dear Secretary Nishida:

Congratulations on the thorough and fine work that your department did on **House Bill 848** regarding the Potomac River intake pipe. The work by J. L. Hearn with the Chesapeake Bay Foundation on the amendments should have made the bill acceptable. I appreciate all the time and work done.

A new bill will focus on the length of the Potomac which is "scenic". This will allay some of the fears about maintenance of existing intake pipes.

If there is any action regarding the Potomac River, I request that I be given notice as soon as possible.

All my best,

Jean Cryor

EXHIBIT
16

MDE01655

L-389

Legislative District 15
Montgomery County

District Office:
11700 Ambleside Drive
Potomac, Maryland 20854-2101
(301) 762-7983 FAX (301) 424-7718

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

JEAN B. CRYOR

Ways and Means Committee

Annapolis Office:
219 Lowe House Office Building
Annapolis, Maryland 21401
(301) 858-3052

RECEIVED
MAR 23 1998
[redacted]

March 19, 1998

Mr. Terry Clark
Non-tidal Wetlands and Waterways Division
Maryland Department of the Environment
2599 Broening Highway
Baltimore, MD 21224

Dear Mr. Clark: Terry

As you may know, **House Bill 848, Potomac River, Water Removal** was defeated this year in committee. I appreciate all the work you did to schedule the hearing and provide information. I can't help but be disappointed that the bill did not go through. We will try again next year to protect our river from Virginia.

In the mean time, should any requests come for any construction on the Potomac River, please let me know as soon as possible.

Thank you again.

All my best,

Jean Cryor

EXHIBIT 17

MDE01657

L-390

SENATE BILL 582

Unofficial Copy
M3

1999 Regular Session
9lr1771
CF 9lr1580

By: **Senators Van Hollen, Frosh, Roesser, Sfikas, Hogan, Forehand, McCabe, and Pinsky**
Introduced and read first time: February 5, 1999
Assigned to: Economic and Environmental Affairs

Committee Report: Favorable with amendments
Senate action: Adopted
Read second time: March 25, 1999

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to conduct a certain study of a certain portion of the Potomac River Basin to examine certain issues; requiring the Secretary to make certain ~~determinations, assessments,~~ assessments and and recommendations; authorizing the Secretary to coordinate a certain study with other federal and state units; establishing certain deadlines for a certain study; establishing certain reporting requirements; prohibiting a ~~person from constructing or blasting in the Potomac River under certain circumstances~~ the Secretary from issuing a waterway construction permit to construct a water intake pipe in the Potomac River for a certain period of time unless certain circumstances exist; clarifying the construction of certain provisions; making provisions of this Act severable; providing for the legislative intent of this Act; defining certain terms; providing for the termination of this Act; and generally relating to the protection of the Potomac River.

BY adding to
Article - Environment
Section 5-12A-01 through ~~5-12A-05~~ 5-12A-04, inclusive, to be under the new subtitle "Subtitle 12A. Potomac River Study"
Annotated Code of Maryland
(1996 Replacement Volume and 1998 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

L-391

SENATE BILL 582

Article - Environment

SUBTITLE 12A. POTOMAC RIVER STUDY.

5-12A-01.

(A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.

(C) "MINIMUM FLOWBY" MEANS THE MINIMUM DAILY FLOW REMAINING IN THE POTOMAC RIVER AT LITTLE FALLS AFTER ALL WATER WITHDRAWALS.

5-12A-02.

THE PURPOSE OF THIS SUBTITLE IS TO:

(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION;

(2) FOSTER AN ADDITIONAL UNDERSTANDING OF THREATS TO WATER QUALITY AND WATER QUANTITY IN THE POTOMAC RIVER FOR THE BETTER MANAGEMENT OF RESOURCES; AND

(3) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.

5-12A-03.

(A) THE SECRETARY SHALL CONDUCT A STUDY OF THE NONTIDAL PORTION OF THE POTOMAC RIVER BASIN TO:

~~(1)~~ PROVIDE A COMPREHENSIVE ASSESSMENT OF FUTURE WATER SUPPLIES AND DEMANDS FOR THE POTOMAC BASIN, INCLUDING:

~~(I)~~ (1) A COMPARISON OF THE SUPPLY AND DEMAND FROM 1999 THROUGH THE YEAR ~~2035~~ 2030;

~~(II)~~ (2) THE SOURCES OF DEMAND, INCLUDING MAJOR AND MINOR WATER SUPPLIERS AND THEIR CUSTOMERS;

~~(III)~~ (3) A DETERMINATION OF VARIATIONS IN DEMAND, INCLUDING ~~THE NEED TO MEET~~ PEAK DEMAND ~~DURING CONDITIONS COMPARABLE TO THE MOST SEVERE DROUGHT AND THE LONGEST DROUGHT OF RECORD~~;

~~(IV) THE IMPACT OF DEMAND FROM OUTLYING AREAS ON WATER SUPPLY SOURCES PRIMARILY FOR THE METROPOLITAN WASHINGTON AREA;~~

(4) THE FREQUENCY AND DURATION OF LOW FLOW OCCURRENCES IN THE RIVER AND THEIR IMPACT ON WATER AVAILABILITY; AND

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~~(V)~~ (5) THE AVAILABILITY OF RESERVOIRS TO AUGMENT RIVER FLOW ~~ONLY TO THE EXTENT THAT RESERVOIR WATER WILL NOT ADVERSELY IMPACT THE TEMPERATURE, PH, SALINITY, NUTRIENT, OR CHEMICAL CONTENT OF THE POTOMAC RIVER;~~

~~(VI) AN ACCOUNTING FOR COMPLIANCE WITH CURRENT AND ANTICIPATED NATIONAL PRIMARY AND SECONDARY DRINKING WATER STANDARDS, INCLUDING STANDARDS FOR ORGANIC CHEMICALS, RADIOACTIVITY, MICROBIOLOGICAL CONTAMINATION, TASTE, AND ODOR; AND~~

~~(VII) AN ACCOUNTING FOR WATER QUALITY TRENDS, INCLUDING POTENTIAL WATER QUALITY DETERIORATION DUE TO POPULATION GROWTH, INCREASED INDUSTRIAL, COMMERCIAL, AND RESIDENTIAL DEVELOPMENT, CHANGES IN AGRICULTURAL PRACTICES, INCLUDING GROWTH IN THE NUMBER AND SIZE OF INTENSIVE ANIMAL PRODUCTION FACILITIES, AND CONTAMINATED SEDIMENT;~~

~~(2) ANALYZE THE EXTENT OF EXISTING OR POTENTIAL THREATS TO HEALTH AND THE WATER QUALITY OF THE POTOMAC RIVER BY CRYPTOSPORIDIUM, GIARDIA, AND OTHER MICROORGANISMS;~~

~~(3) IDENTIFY THE POLLUTANTS OF CONCERN IN THE POTOMAC RIVER, INCLUDING THOSE LISTED IN THE AMENDMENTS TO THE SAFE DRINKING WATER ACT AMENDMENTS OF 1996, THE MARYLAND SOURCE WATER ASSESSMENT PROGRAM, AND MARYLAND TOXIC SUBSTANCES CRITERIA FOR AMBIENT SURFACE WATERS; AND~~

~~(4) ASSESS EXISTING OR POTENTIAL THREATS TO THE ESTHETIC, RECREATIONAL, AND ECOLOGICAL VALUES OF THE RIVER BY CONSTRUCTION THAT OCCURS ON THE RIVERBED.~~

'5 (B) IN THE STUDY, THE SECRETARY SHALL:

~~(1) DETERMINE A MINIMUM FLOWBY REQUIREMENT WHICH IS ADEQUATE TO ENSURE:~~

~~(I) THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF THE RIVER;~~

~~(II) THE RESTORATION AND PROTECTION OF THE TIDAL ESTUARY, INCLUDING APPROPRIATE DISSOLVED OXYGEN AND SALINITY LEVELS;~~

~~(III) COMPLIANCE WITH EXISTING AND ANTICIPATED WATER QUALITY STANDARDS;~~

~~(IV) COMPLIANCE WITH EXISTING AND ANTICIPATED NATIONAL PRIMARY AND SECONDARY DRINKING WATER STANDARDS, INCLUDING STANDARDS FOR ORGANIC CHEMICALS, RADIOACTIVITY, MICROBIOLOGICAL CONTAMINATION, TASTE, AND ODOR;~~

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~~(V) HABITAT REQUIREMENTS, INCLUDING QUANTITY AND QUALITY HABITAT, TO ENSURE PROTECTION AND PROPAGATION OF A BALANCED, INDIGENOUS POPULATION OF FISH, SHELLFISH, AND WILDLIFE; AND~~

~~(VI) PROTECTION OF THE RIVER'S AQUATIC, TERRESTRIAL, RECREATIONAL, AND ESTHETIC RESOURCES;~~

~~(2)~~ INCORPORATE THE FOLLOWING ASSESSMENTS:

~~(I)~~ (1) THAT CONSERVATION WILL REDUCE DEMAND ~~ONLY~~ TO THE EXTENT THAT CONSERVATION MEASURES ~~ARE ADDRESSED BY AN ADEQUATE ENFORCEMENT PROGRAM~~ HAVE BEEN SHOWN TO BE EFFECTIVE IN THE PAST; AND

~~(II)~~ (2) THAT ALTERNATE WATER SUPPLIES ARE AVAILABLE ONLY TO THE EXTENT THAT SUCH SUPPLIES CAN BE READILY AVAILABLE WITHIN THE STUDY TIMETABLE~~, ARE ECONOMICALLY AND TECHNICALLY FEASIBLE, AND WILL NOT HAVE SIGNIFICANT ADVERSE HEALTH OR ENVIRONMENTAL IMPACTS~~;

~~(3) RECOMMEND MEANS FOR MINIMIZING OR ELIMINATING THE POTENTIAL THREAT TO HEALTH AND THE WATER QUALITY POSED BY CRYPTOSPORIDIUM, GIARDIA, AND OTHER MICROORGANISMS;~~

~~(4) RECOMMEND RESTRICTIONS OR PROHIBITIONS ON CONSTRUCTION IN THE POTOMAC RIVER TO PROTECT THE ESTHETIC, RECREATIONAL, AND ECOLOGICAL VALUES OF THE RIVER;~~

~~(5) IDENTIFY AREAS OF SCIENTIFIC UNCERTAINTY AND AREAS THAT REQUIRE FURTHER RESEARCH;~~

~~(6) ANALYZE THE EXTENT TO WHICH THE WITHDRAWAL OF WATER FROM INTAKE PIPES EXTENDING FROM THE SHORELINE MAY AFFECT THE WATER QUALITY OF THE POTOMAC RIVER; AND~~

~~(7) ANALYZE THE IMPACT OF CURRENT AND FUTURE BUILDING AND DEVELOPMENT IN THE MARYLAND PORTION OF THE POTOMAC RIVER WATERSHED ON THE WATER QUALITY OF THE POTOMAC RIVER AND RECOMMEND STEPS THAT CAN BE TAKEN TO AVOID, MINIMIZE, AND MITIGATE ANY IMPACT THAT MAY RESULT~~.

(C) THE SECRETARY MAY COORDINATE THE STUDY OF THE POTOMAC RIVER WITH OTHER FEDERAL AND STATE UNITS, INCLUDING THE INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN.

(D) (1) THE SECRETARY SHALL BEGIN THE STUDY ON OR BEFORE JULY 1, 1999.

(2) ON OR BEFORE DECEMBER 1, 2000, THE SECRETARY SHALL PUBLISH A NOTICE OF THE AVAILABILITY OF A DRAFT OF THE POTOMAC RIVER STUDY IN THE MARYLAND REGISTER AND SHALL ALLOW AT LEAST A 60-DAY COMMENT PERIOD. THE SECRETARY SHALL RESPOND TO THE PUBLIC COMMENTS AND SHALL INCLUDE

BEST AVAILABLE COPY

A SUMMARY OF THE COMMENTS AND THE SECRETARY'S RESPONSE AS PART OF THE POTOMAC RIVER STUDY.

(3) ON OR BEFORE JUNE 1, 2001, THE SECRETARY SHALL PUBLISH A NOTICE OF PUBLIC AVAILABILITY OF THE FINAL POTOMAC RIVER STUDY IN THE MARYLAND REGISTER.

(4) (I) THE SECRETARY SHALL SUBMIT TO THE GENERAL ASSEMBLY THE FINAL REPORT OF THE STUDY BY JUNE 1, 2001.

(II) THE REPORT SHALL INCLUDE A SUMMARY OF ONGOING WATER QUALITY STUDIES PERTAINING TO THE POTOMAC RIVER BASIN AND THEIR STATUS.

5-12A-04.

(A) (1) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF LAW OR REGULATION THAT IMPOSES MORE STRINGENT OR ADDITIONAL STANDARDS OR REQUIREMENTS.

(2) THIS SECTION DOES NOT PRECLUDE OR DENY ANY RIGHT OF THE STATE, ITS UNITS, OR POLITICAL SUBDIVISIONS FROM ADOPTING OR ENFORCING MORE STRINGENT OR ADDITIONAL STANDARDS OR REQUIREMENTS.

~~(B) A PERSON MAY NOT, PRIOR TO 6 MONTHS AFTER THE SECRETARY HAS SUBMITTED TO THE GENERAL ASSEMBLY THE STUDY REQUIRED PURSUANT TO THIS SUBTITLE:~~

~~(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER THAT EXTENDS MORE THAN 50 FEET FROM THE RIVER BANK;~~

~~(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE; OR~~

~~(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 3 FEET BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

~~5-12A-05.~~

~~THE PROVISIONS OF THIS SUBTITLE SHALL REMAIN EFFECTIVE UNTIL JUNE 1, 2003 AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY THIS SUBTITLE SHALL BE ABROGATED AND OF NO FURTHER FORCE AND EFFECT.~~

(B) THE SECRETARY MAY NOT, PRIOR TO 6 MONTHS AFTER THE SECRETARY HAS SUBMITTED TO THE GENERAL ASSEMBLY THE STUDY REQUIRED UNDER THIS SUBTITLE, GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:

(1) THE PIPE WILL BE USED AS A REPLACEMENT FOR A PIPE ALREADY IN USE;

L-395

(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;

(3) THE PIPE DOES NOT HAVE THE CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE AMOUNT OF WATER THE PERSON IS AUTHORIZED TO WITHDRAW UNDER THE WATER APPROPRIATION PERMIT BY MORE THAN 5 MGD; AND

(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 1999.

L-396

HOUSE BILL 615

Unofficial Copy
M3

1999 Regular Session
9lr1580
CF 9lr1771

By: Delegates Cryor, Barkley, Boutin, Brinkley, Cadden, Conroy, Dembrow, Dypski, Frush, Goldwater, Hecht, Heller, Hubbard, Klausmeier, La Vay, Leopold, Marriott, Montague, Petzold, Pitkin, Riley, Rosso, Shriver, Stocksdale, Bronrott, and Kagan
Introduced and read first time: February 11, 1999
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 30, 1999

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to conduct a certain study of a certain portion of the Potomac River Basin to examine certain issues; requiring the Secretary to make certain ~~determinations, assessments,~~ assessments and recommendations; authorizing the Secretary to coordinate a certain study with other federal and state units; establishing certain deadlines for a certain study; establishing certain reporting requirements; prohibiting a ~~person from constructing or blasting in the Potomac River under certain circumstances~~ the Secretary from issuing a waterway construction permit to construct a water intake pipe in the Potomac River for a certain period of time unless certain circumstances exist; clarifying the construction of certain provisions; making provisions of this Act severable; providing for the legislative intent of this Act; defining certain terms; providing for the termination of this Act; and generally relating to the protection of the Potomac River.

BY adding to
Article - Environment
Section 5-12A-01 through ~~5-12A-05~~ 5-12A-04, inclusive, to be under the new subtitle "Subtitle 12A. Potomac River Study"
Annotated Code of Maryland
(1996 Replacement Volume and 1998 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

EXHIBIT 19

Article - Environment

SUBTITLE 12A. POTOMAC RIVER STUDY.

5-12A-01.

(A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.

(C) "MINIMUM FLOWBY" MEANS THE MINIMUM DAILY FLOW REMAINING IN THE POTOMAC RIVER AT LITTLE FALLS AFTER ALL WATER WITHDRAWALS

5-12A-02.

THE PURPOSE OF THIS SUBTITLE IS TO:

(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION;

(2) FOSTER AN ADDITIONAL UNDERSTANDING OF THREATS TO WATER QUALITY AND WATER QUANTITY IN THE POTOMAC RIVER FOR THE BETTER MANAGEMENT OF RESOURCES; AND

(3) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS

5-12A-03.

(A) THE SECRETARY SHALL CONDUCT A STUDY OF THE NONTIDAL PORTION OF THE POTOMAC RIVER BASIN TO:

~~(1)~~ PROVIDE A COMPREHENSIVE ASSESSMENT OF FUTURE WATER SUPPLIES AND DEMANDS FOR THE POTOMAC BASIN, INCLUDING:

~~(I)~~ (1) A COMPARISON OF THE SUPPLY AND DEMAND FROM NOW THROUGH THE YEAR ~~2035~~ 2030;

~~(II)~~ (2) THE SOURCES OF DEMAND, INCLUDING MAJOR AND MINOR WATER SUPPLIERS AND THEIR CUSTOMERS;

~~(III)~~ (3) A DETERMINATION OF VARIATIONS IN DEMAND, INCLUDING ~~THE NEED TO MEET~~ PEAK DEMAND ~~DURING CONDITIONS COMPARABLE TO THE MOST SEVERE DROUGHT AND THE LONGEST DROUGHT OF RECORD~~;

~~(IV) THE IMPACT OF DEMAND FROM OUTLYING AREAS ON WATER SUPPLY SOURCES PRIMARILY FOR THE METROPOLITAN WASHINGTON AREA;~~

(4) THE FREQUENCY AND DURATION OF LOW FLOW OCCURRENCES IN THE RIVER AND THEIR IMPACT ON WATER AVAILABILITY; AND

L-398

(V) (5) THE AVAILABILITY OF RESERVOIRS TO AUGMENT RIVER FLOW ~~ONLY TO THE EXTENT THAT RESERVOIR WATER WILL NOT ADVERSELY IMPACT THE TEMPERATURE, PH, SALINITY, NUTRIENT, OR CHEMICAL CONTENT OF THE POTOMAC RIVER;~~

~~(VI) AN ACCOUNTING FOR COMPLIANCE WITH CURRENT AND ANTICIPATED NATIONAL PRIMARY AND SECONDARY DRINKING WATER STANDARDS, INCLUDING STANDARDS FOR ORGANIC CHEMICALS, RADIOACTIVITY, MICROBIOLOGICAL CONTAMINATION, TASTE, AND ODOR; AND~~

~~(VII) AN ACCOUNTING FOR WATER QUALITY TRENDS, INCLUDING POTENTIAL WATER QUALITY DETERIORATION DUE TO POPULATION GROWTH, INCREASED INDUSTRIAL, COMMERCIAL, AND RESIDENTIAL DEVELOPMENT, CHANGES IN AGRICULTURAL PRACTICES, INCLUDING GROWTH IN THE NUMBER AND SIZE OF INTENSIVE ANIMAL PRODUCTION FACILITIES, AND CONTAMINATED SEDIMENT;~~

~~(2) ANALYZE THE EXTENT OF EXISTING OR POTENTIAL THREATS TO HEALTH AND THE WATER QUALITY OF THE POTOMAC RIVER BY CRYPTOSPORIDIUM, GIARDIA, AND OTHER MICROORGANISMS;~~

~~(3) IDENTIFY THE POLLUTANTS OF CONCERN IN THE POTOMAC RIVER; AND~~

~~(4) ASSESS EXISTING OR POTENTIAL THREATS TO THE ESTHETIC, RECREATIONAL, AND ECOLOGICAL VALUES OF THE RIVER BY CONSTRUCTION THAT OCCURS ON THE RIVERBED.~~

(B) IN THE STUDY, THE SECRETARY SHALL:

~~(1) DETERMINE A MINIMUM FLOWBY REQUIREMENT WHICH IS ADEQUATE TO ENSURE:~~

~~(I) THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF THE RIVER;~~

~~(II) THE RESTORATION AND PROTECTION OF THE TIDAL ESTUARY, INCLUDING APPROPRIATE DISSOLVED OXYGEN AND SALINITY LEVELS;~~

~~(III) COMPLIANCE WITH EXISTING AND ANTICIPATED WATER QUALITY STANDARDS;~~

~~(IV) COMPLIANCE WITH EXISTING AND ANTICIPATED NATIONAL PRIMARY AND SECONDARY DRINKING WATER STANDARDS, INCLUDING STANDARDS FOR ORGANIC CHEMICALS, RADIOACTIVITY, MICROBIOLOGICAL CONTAMINATION, TASTE, AND ODOR;~~

~~(V) HABITAT REQUIREMENTS, INCLUDING QUANTITY AND QUALITY HABITAT, TO ENSURE PROTECTION AND PROPAGATION OF A BALANCED, INDIGENOUS POPULATION OF FISH, SHELLFISH, AND WILDLIFE; AND~~

~~(VI) PROTECTION OF THE RIVER'S AQUATIC, TERRESTRIAL, RECREATIONAL, AND ESTHETIC RESOURCES;~~

~~(2)~~ INCORPORATE THE FOLLOWING ASSESSMENTS:

~~(I)~~ (1) THAT CONSERVATION WILL REDUCE DEMAND ~~ONLY~~ TO THE EXTENT THAT CONSERVATION MEASURES ~~ARE ADDRESSED BY AN ADEQUATE ENFORCEMENT PROGRAM~~ HAVE BEEN SHOWN TO BE EFFECTIVE IN THE PAST; AND

~~(II)~~ (2) THAT ALTERNATE WATER SUPPLIES ARE AVAILABLE ONLY TO THE EXTENT THAT SUCH SUPPLIES CAN BE READILY AVAILABLE WITHIN THE STUDY TIMETABLE~~, ARE ECONOMICALLY AND TECHNICALLY FEASIBLE, AND WILL NOT HAVE SIGNIFICANT ADVERSE HEALTH OR ENVIRONMENTAL IMPACTS~~;

~~(3) RECOMMEND MEANS FOR MINIMIZING OR ELIMINATING THE POTENTIAL THREAT TO HEALTH AND THE WATER QUALITY POSED BY CRYPTOSPORIDIUM, GIARDIA, AND OTHER MICROORGANISMS;~~

~~(4) RECOMMEND RESTRICTIONS OR PROHIBITIONS ON CONSTRUCTION IN THE POTOMAC RIVER TO PROTECT THE ESTHETIC, RECREATIONAL, AND ECOLOGICAL VALUES OF THE RIVER; AND~~

~~(5) IDENTIFY AREAS OF SCIENTIFIC UNCERTAINTY AND AREAS THAT REQUIRE FURTHER RESEARCH~~.

(C) THE SECRETARY MAY COORDINATE THE STUDY OF THE POTOMAC RIVER WITH OTHER FEDERAL AND STATE UNITS, INCLUDING THE INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN.

(D) (1) THE SECRETARY SHALL BEGIN THE STUDY ON OR BEFORE JULY 1, 1999.

(2) ON OR BEFORE DECEMBER 1, 2000, THE SECRETARY SHALL PUBLISH A NOTICE OF THE AVAILABILITY OF A DRAFT OF THE POTOMAC RIVER STUDY IN THE MARYLAND REGISTER AND SHALL ALLOW AT LEAST A 60-DAY COMMENT PERIOD. THE SECRETARY SHALL RESPOND TO THE PUBLIC COMMENTS AND SHALL INCLUDE A SUMMARY OF THE COMMENTS AND THE SECRETARY'S RESPONSE AS PART OF THE POTOMAC RIVER STUDY.

(3) ON OR BEFORE JUNE 1, 2001, THE SECRETARY SHALL PUBLISH A NOTICE OF PUBLIC AVAILABILITY OF THE FINAL POTOMAC RIVER STUDY IN THE MARYLAND REGISTER.

(4) (I) THE SECRETARY SHALL SUBMIT TO THE GENERAL ASSEMBLY THE FINAL REPORT OF THE STUDY BY JUNE 1, 2001.

(II) THE REPORT SHALL INCLUDE A SUMMARY OF ONGOING WATER QUALITY STUDIES PERTAINING TO THE POTOMAC RIVER BASIN AND THEIR STATUS.

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~~5-12A-04.~~

(A) (1) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF LAW OR REGULATION THAT IMPOSES MORE STRINGENT OR ADDITIONAL STANDARDS OR REQUIREMENTS.

(2) THIS SECTION DOES NOT PRECLUDE OR DENY ANY RIGHT OF THE STATE, ITS UNITS, OR POLITICAL SUBDIVISIONS FROM ADOPTING OR ENFORCING MORE STRINGENT OR ADDITIONAL STANDARDS OR REQUIREMENTS.

~~(B) A PERSON MAY NOT:~~

~~(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;~~

~~(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE; OR~~

~~(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 3 FEET BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

~~5-12A-05.~~

~~THE PROVISIONS OF THIS SUBTITLE SHALL REMAIN EFFECTIVE UNTIL JUNE 1, 2002 AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY THIS SUBTITLE SHALL BE ABROGATED AND OF NO FURTHER FORCE AND EFFECT.~~

(B) THE SECRETARY MAY NOT, PRIOR TO 6 MONTHS AFTER THE SECRETARY HAS SUBMITTED TO THE GENERAL ASSEMBLY THE STUDY REQUIRED UNDER THIS SUBTITLE, GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:

(1) THE PIPE WILL BE USED AS A REPLACEMENT FOR A PIPE ALREADY IN USE;

(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;

(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE AMOUNT OF WATER THE PERSON IS AUTHORIZED TO WITHDRAW UNDER THE WATER APPROPRIATION PERMIT BY MORE THAN 5 MGD; AND

(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.

(C) SUBSECTION (B) OF THIS SECTION ONLY APPLIES TO A PERMIT WATERWAY CONSTRUCTION PERMIT PENDING ON OR BEFORE APRIL 15, 1999.

L-401

SECTION 2. AND BE IT FURTHER ENACTED. That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 3. AND BE IT FURTHER ENACTED. That this Act shall take effect June 1, 1999.

L-402

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Mark L. Earley
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 · 786 · 2071
804 · 371 · 8946 TDD

November 30, 1999

The Honorable J. Joseph Curran, Jr.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

Dear Attorney General Curran:

On behalf of the Commonwealth of Virginia, I am writing to call to your attention the unfortunate failure by the State of Maryland to honor the property rights held by Virginia and her citizens under the Potomac River Compact of 1958, and to call upon Maryland to take steps to ensure that those rights are honored.

For more than 200 years, the river that forms the border between our two States has been the subject of formal agreements under which Virginia and her citizens have enjoyed the right to make and carry out improvements extending into the river from the Virginia shores. Originally set forth in the Compact of 1785, those rights were carried forward in the Potomac River Compact of 1958. These rights are not subject to any prerogative in the State of Maryland to judge the necessity of any such improvements, and are only subject to the requirement that Virginia's improvements not obstruct or injure the navigation of the river, or disturb fisheries.

Desiring to exercise its rights under the Compact of 1958, the Fairfax County Water Authority ("the Fairfax Authority"), a political subdivision of Virginia, has proposed constructing a pipe from the Virginia shore into mid-river to provide a new water intake point. Nothing in the Compact of 1958 requires the Fairfax Authority to obtain the approval of – or obtain any permit from – any official in the State of Maryland in order to construct any such improvement; however, as a matter of comity and for ease of administration, the Fairfax Authority made application for a permit to the Maryland Department of the Environment. This was four years ago. Still no permit has been issued.

During the intervening years, the Fairfax Authority has agreed with all reasonable suggestions by the State of Maryland about the construction of the pipe, including the suggestion that the structure be kept at least 2 ½ feet below the surface of the river, as measured by its lowest flow of record. Maryland officials have stipulated that such a structure would not obstruct or injure the navigation of the river, nor disturb fisheries. The United States Army Corps of Engineers has also given its approval, subject only to a successful resolution of the

EXHIBIT
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permit question. Still the permit has not been issued. Instead, Maryland officials have demanded that Virginia now demonstrate to the satisfaction of your State the necessity of the pipe. This is not acceptable. Nothing in the Compact of 1958 permits the State of Maryland to sit in judgment on the necessity of improvements undertaken by Virginia and its citizens. As I am sure you will understand, the Commonwealth cannot acquiesce in such an infringement on the riparian rights exercised by Virginians for more than 200 years — just as Maryland could not do so if the facts were reversed.

Solely as a matter of comity between our States – and not to suggest any power of review on the part of Maryland – I must also bring to your attention the reasons why Virginia views this matter with such seriousness. More than one million Virginians depend on the Potomac River for their water. The intake pipe that is now in use is quite close to the shore and the quality of water drawn into it has deteriorated markedly over the years, making it more expensive to treat and less reliable as a source of clean, healthful water. The new mid-river intake would be more reliable, provide a better quality of water and require less expensive treatment procedures. These are substantial advantages, which I trust demonstrate Virginia's resolve and purpose in the matter.

Four years is long enough to wait for your State's assent. The people of Virginia are entitled to the benefits the new pipe will bring them without further delay. Accordingly, the Commonwealth of Virginia hereby calls upon our sister State of Maryland to bring this issue to a successful resolution by the end of the year. This can be done either by causing a fully effective permit to be issued by that date or by making formal acknowledgement that, under the Potomac River Compact of 1958, the Fairfax County Water Authority needs no permit from Maryland before proceeding with the construction of this improvement.

Your careful attention to these concerns will be most appreciated.

Very truly yours,

Mark L. Earley

L-404

J. Joseph Curran, Jr.
Attorney General

Carmen M. Shepard
Donna Hill Staton
Deputy Attorneys General

(410) 576-7036

(410) 576-6311

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

January 4, 2000

EXHIBIT 21

The Honorable Mark L. Earley
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

RECEIVED
JAN 6 2000
Office of the Attorney General

Dear Attorney General Earley:

Thank you for your recent letter concerning the Fairfax County Water Authority's proposal to construct a mid-river water intake in the Potomac River. While I appreciate your concerns and am available to discuss the matter further, I cannot comply with your request to issue a permit for the intake or otherwise waive Maryland's jurisdiction over the matter.

The state of Maryland does not share your interpretation of the 1958 Compact. Article Seven of the Compact preserves the traditional riparian rights of the citizens of Virginia to make and carry out wharves and other improvements into the Potomac. Those rights have always been subject to government regulation in both Maryland and Virginia under the police power. There is no indication in the Compact that our two states intended to create a new breed of riparian rights in the Potomac that would forever be insulated from state regulation.

Furthermore, the Maryland Court of Appeals - the highest court in this State - has twice ruled that the Compact of 1785 applies only to the tidal stretches of the Potomac downstream of the District of Columbia. These decisions were carried forward in the Compact of 1958, which itself is expressly limited to the tidal portions of the river. In light of these considerations, the State of Maryland cannot agree that the Fairfax County Water Authority is entitled to construct the proposed intake under the Compact.

As you point out in your letter, the Fairfax County Water Authority submitted an application to the Department of the Environment (MDE) for authorization to build the intake, which application was denied in 1997. The Fairfax County Water Authority

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Telephone for Deaf: (410) 576-6372

exercised its right under Maryland law to initiate a contested contested case hearing challenging MDE's denial of the permit. An initial hearing was held in December, 1998. The proposed decision that resulted from that hearing was rejected by the MDE final decision maker in June, 1999, and a second hearing held in November, 1999. The parties are currently preparing post-trial briefs. The contested case process is mandated by Maryland law and must be allowed to run its course.

The State of Maryland takes very seriously its responsibility to manage the Potomac River and its other natural resources in the public interest. Of particular import is the Chesapeake Bay and its tributaries, among which the Potomac is one of the largest. At the same time, Maryland takes very seriously its obligations to Virginia under the 1958 Compact. While I cannot provide the relief you ask for, I am open to any meeting to discuss our position.

Very truly yours,

Joe Curran
Attorney General

JC/[illegible]

L-406

HOUSE BILL 395

Unofficial Copy
M3
HB 615/99 - ENV

2000 Regular Session
0lr0921

By: **Delegates Cryor, Barkley, Barve, Bronrott, Boutin, Cadden, Cane, Carlson, Clagett, Conroy, Dembrow, Dypski, Frush, Glassman, Goldwater, Grosfeld, Heller, Howard, Kach, Leopold, Petzold, Rosso, Riley, Sher, Stern, Stocksdale, Walkup, Kopp, Phillips, La Vay, ~~and~~ ~~Shriver~~ Shriver, and Hubbard**
Introduced and read first time: February 3, 2000
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 25, 2000

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of ~~prohibiting a person from constructing or blasting in the Potomac River under certain circumstances; prohibiting the Secretary of the Environment from issuing a waterway construction permit to construct a water intake pipe in the Potomac River unless certain circumstances exist;~~ requiring the Secretary of the Environment to submit certain reports to the General Assembly; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing a certain exception to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; ~~providing for the legislative intent of this Act; defining a certain term;~~ and generally relating to the ~~protection of~~ waters in the Potomac River basin.

~~BY adding to~~
~~Article - Environment~~
~~Section 5-12A-01 through 5-12A-04, inclusive, to be under the new subtitle "Subtitle 12A. Potomac River Protection Act"~~
~~Annotated Code of Maryland~~
~~(1996 Replacement Volume and 1999 Supplement)~~

EXHIBIT
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SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That ~~the Laws of Maryland read as follows:~~

~~Article – Environment~~

~~SUBTITLE 12A. POTOMAC RIVER PROTECTION ACT.~~

~~5-12A-01.~~

~~IN THIS SUBTITLE, "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.~~

~~5-12A-02.~~

~~THE PURPOSE OF THIS SUBTITLE IS TO:~~

~~(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION; AND~~

~~(2) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.~~

~~5-12A-03.~~

~~(A) UNTIL STUDIES CONCERNING THE POTOMAC RIVER AND WATER RESOURCES IN THE WASHINGTON METROPOLITAN AREA ARE COMPLETED AND SUBMITTED TO THE GOVERNOR AND GENERAL ASSEMBLY, A PERSON MAY NOT:~~

~~(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;~~

~~(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE; OR~~

~~(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

~~5-12A-04.~~

~~THE SECRETARY MAY NOT GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:~~

~~(1) THE PIPE WILL BE USED AS AN ALTERNATIVE FOR A PIPE ALREADY IN USE;~~

~~(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;~~

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L-408

~~(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE CAPACITY OF THE INTAKE ALREADY IN USE; AND~~

~~(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article:

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; and

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment.

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The new pipe will replace a pipe already in use;

(2) The new pipe cannot be used concurrently with the pipe to be replaced;

(3) The new pipe does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

(4) The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow.

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION ~~2.~~ 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any

L-409

reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION ~~3.~~ 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

L-410

SENATE BILL 729

Unofficial Copy
M1

2000 Regular Session
(0lr2488)

ENROLLED BILL
-- Economic and Environmental Affairs/Environmental Matters --

Introduced by **Senators Van Hollen, Hogan, Roesser, Frosh, Pinsky, Forehand, and Sfikas**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this ____ day of _____ at _____ o'clock, ____M.

_____
President.

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to submit certain reports to the General Assembly *by a certain date*; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing ~~a certain exception~~ *certain exceptions* to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; and generally relating to the waters in the Potomac River basin.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article *by July 1, 2002*:

EXHIBIT
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(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; *and*

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment; ~~and~~

~~(4) If Chapter ___ (H.B. 64) of the Acts of the General Assembly of 2000 take effect, the report of the Task Force to Study the Minimum Flow Levels in the Potomac River.~~

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) *The water intake pipe will meet the following conditions:*

~~(1)~~ *(i)* The new pipe will replace a pipe already in use;

~~(2)~~ *(ii)* The new pipe cannot be used concurrently with the pipe to be replaced;

~~(3)~~ *(iii)* The new pipe ~~cannot~~ does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

~~(4)~~ *(iv)* The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow; *or*

(2) *(i)* *The Secretary determines that the issuance of a permit is in the public interest; and*

(ii) *The water intake pipe will meet the following conditions:*

1. *The new pipe will replace a pipe already in use;*

2. *The new pipe cannot be used concurrently with the pipe to be replaced;*

3. *The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow;*

4. *The new pipe will not have the capacity to withdraw a greater quantity of water than the quantity of water that can be withdrawn by the existing intake; and*

L-412

5. *The new pipe will incorporate a physical component, that cannot be modified without the consent of the Department of the Environment, that will limit the capacity of the pipe for maximum daily withdrawal to the maximum amount authorized by the appropriation permit issued to the owner of the pipe under § 5-502 of the Environment Article.*

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

L-413

CHRIS VAN HOLLEN, JR.
18th Legislative District
Montgomery County

Vice Chairman
Budget and Taxation Committee

Chairman
Health and Human
Resources Subcommittee

Joint Committee on Pensions

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401-1991

Annapolis Office
304 James Senate Office Building
Annapolis, Maryland 21401-1991
301-858-3137 · 410-841-3137

District Office
3314 Farragut Avenue
Kensington, Maryland 20895-2133
301-933-3313

RECEIVED
APR 19 2000
OFFICE OF THE SECRETARY
MD DEPT OF THE ENVIRONMENT

April 18, 2000

The Honorable Parris N. Glendening
Office of the Governor
State House
Annapolis, MD 21401

Dear Governor Glendening:

I am writing regarding the Potomac River Protection legislation. As you know, for the past several years Delegate Cryor and I have introduced bills aimed at preventing large new withdrawals of water from the Potomac River until we have the opportunity to fully study their impact on drinking water supplies and the resources of the River. While these bills affect most entities seeking permits to build new water intake pipes, the entity most immediately affected is the Fairfax County Water Authority (FCWA), which is in the process of seeking a permit from the Maryland Department of Environment (MDE) to construct a mid-river intake pipe in the Potomac. As you know, MDE denied the FCWA's permit request and the dispute is now the subject of an administrative law proceeding. In addition, the State of Virginia has filed suit in the Supreme Court of the United States contesting Maryland's control over the Potomac River.

This year, as the General Assembly considered the Potomac River bills, Delegate Cryor and I met with Secretary Jane Nishida to discuss the best strategy to pursue given the current legal situation. At that time, I suggested that we amend the Senate bill to allow the Secretary greater flexibility to negotiate a settlement of the legal proceedings on favorable terms should the opportunity arise. Secretary Nishida supported this approach and the Department testified in favor of the amendment. Secretary Nishida informed me that she would recommend that you sign that version of the legislation. Delegate Cryor also agreed that if the Senate bill, as amended, passed she would support that strategy.

EXHIBIT
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I would be happy to sit down with you to discuss the merits of the approach taken in the Senate bill. This is a complex issue that has been further complicated by Virginia's action in the Supreme Court. We must ensure that we do not embark on a course of action that jeopardizes Maryland's control of the Potomac River.

Sincerely,

Chris Van Hollen, Jr.

cc: Secretary Jane T. Nishida
Joseph Bryce
W. Kevin Hughes
The Honorable Jean Cryor

L-415

ORIGINAL

NO. 129, ORIGINAL
IN THE
SUPREME COURT OF THE UNITED STATES
- - - - - - - - - - - - - - - -

COMMONWEALTH OF VIRGINIA

Plaintiff

vs

STATE OF MARYLAND

Defendant

- - - - - - - - - - - - - - - -

Before the Special Master
The Hon. Ralph I. Lancaster, Jr.

Deposition of: September 26, 2001

HERBERT M. SACHS

called for examination by counsel for the plaintiff, pursuant to notice, at the offices of Hunton & Williams, 1751 Pinnacle Drive, Suite 1700, McLean, Virginia, commencing at 10:00 a.m., before James M. Turner, RMR, Notary Public for the Commonwealth of Virginia.

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L-416

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C-O-N-T-E-N-T-S

WITNESS: Herbert M. Sachs

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Thereupon,

HERBERT M. SACHS

was called as a witness and, after being duly sworn b the notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. RAPHAEL:

Q Good morning, Mr. Sachs?

A Good morning.

Q Could you state your present address, pleas

A My address is 221 South Southwood Avenue, Annapolis, Maryland, 21401.

Q How are you presently employed?

A I am working for Maryland Department of the Environment in the Office of the Secretary and I am t Director of right now Special Projects.

BY MR. RAPHAEL:

Q What I would like to do is try to bracket th years where you had a hierarchical supervisory role with respect to water appropriation and water construction. And, if I understand it correctly, it is between 1978 and 1988. That is one period of time. Right?

A No, I had no responsibility for appropriatio in '78.

Q I'm sorry. Between 1971 and 1978?

A That's correct.

Q Then again between 1988 --

A And '92.

Q To '92. Did you also have involvement on behalf of Maryland with respect to the negotiation of the Low Flow Allocation Agreement?

A Yes, sir.

Q Were you involved on the legislative side with obtaining Section 181 of the Water Resources Development Act of 1976?

A I did testify on that, yes.

Q Then you were involved after that in the negotiations of the actual contract, the document that comprised the Low Flow Allocation Agreement?

A Yes. I don't recall the timing. I think we had actually started working on the Low Flow Allocatic Agreement even before the hearings.

Q You were involved in that process as well?

A Yes.

Q At what level of the hierarchy of people in Maryland responsible for Maryland's position were you?

A I was probably the lead staff person on it for Maryland. The three people who were involved from Maryland, as I recall, were Secretary Coulter, our Chief Counsel, Warren Rich, and myself.

Q I'm going to go over this in further detail during the deposition, but at this point I'm trying to get an overview of what areas I need to ask you about. Did you also have involvement on behalf of Maryland with respect to the creation of the Water Supply Coordination Agreement of 1982?

A Not as much. Because that was mainly among the utilities working with the Interstate Commission. So I didn't have direct involvement with that.

Q Of the people who are around today, if I wanted to find out -- in your view, who knows the most on the Maryland side about Maryland's participation in the negotiations and discussions leading up to the Low Flow Allocation Agreement?

A I think I do.

Q Are you aware that the Washington Aqueduct has provided water to certain parts of Northern Virginia?

A Yes, sir.

Q Including Arlington County?

A Yes, sir.

Q And the City of Falls Church? Did you know that? Were you aware of that?

A Yes, sir, I think so.

Q And, to your knowledge, Maryland has never required a water appropriation permit from the Washington Aqueduct, has it?

A That's correct.

Q And you have never required a permit -- Maryland has never required a permit from the Virginia municipalities that receive their water from the Washington Aqueduct?

A That's correct.

Q Okay. We have handed you what has been marked as Sachs exhibit six. Have you had a chance to look at that?

A Yes.

Q Is Sachs exhibit six a copy of Mr. Jensen's letter of July 8, 1976 to you?

A Yes, it is.

Q This is one of the documents that your counsel provided to you in advance of the deposition. Is that right?

A That is correct.

Q On page two of the letter, in the second full paragraph, it reads, "It should be stated for the

record, that Virginia has not recognized the Maryland permit and appropriation authority for Virginia water nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785."

Do you see that?

A Yes.

Q At the time you received this letter, did you know what the Compact of 1785 was?

A I don't think so.

Q You had never heard of that before?

A I may have heard reference to it, but I certainly am not familiar enough with it to indicate how I would relate that to the compact.

Q When you received this letter, what did you understand Mr. Jensen to mean in this paragraph that we just read, the second full paragraph on page two?

A I'm not certain. That is 25 years ago. But throughout my tenure with the Department I had seen several indications from writers in Virginia that they questioned Maryland's authority on issuing permits. I never did understand -- I didn't really work too hard to find out -- what that right of Virginia's was and what a riparian right really entails. So, I just proceeded with the direction that I was given to issue permits to anyone withdrawing from the mainstem Potomac.

Q Okay. This letter of July 8, 1976 which contains this statement questioning Maryland's authority to regulate Virginia, you have seen other letters like that from time to time?

A I think I saw at least one other letter, but

then also the testimony at that conference. So I do recall there were several instances when -- but never do I recall an applicant protesting Maryland's authority when applying for permits. But I did read Jensen's letter and, I believe, several others.

(No. 11 - Memo Jones to Jensen et al 8/17/76, marked for identification.)

BY MR. RAPHAEL:

Q Let me hand you a document which we have had marked as Sachs exhibit number 11. This is a memo from D.F. Jones to E.T. Jensen at the Virginia State Water Control Board. This document was among the records that were provided to you in advance of the deposition today by your counsel, correct?

A I believe so.

Q And the cover memo describes a meeting between Maryland and Virginia officials on August 16, 1976, and there is attached to the memo an attendee sheet which has your name on it as the third entry. Do you see that?

A Yes, sir.

Q That is your handwriting, isn't it?

A Yes, sir.

Q Does this refresh your recollection that you attended a meeting on August 16, 1976?

A I accept that I was at the meeting. I signed it.

Q Okay. In the second paragraph of this memo there's a discussion about the meeting. It says, "It was a good meeting with discussion of a wide range of technical issues. However, there were still a wide difference of views after the meeting. Stated bluntly, the positions still remain unchanged with Maryland's Attorney General maintaining that Maryland owns the Potomac and has the right to allocate water through their permit system: and with Virginia's position as expressed by SWCB Chairman Bourassa that Virginia has vested rights to Potomac water and does not need to have an allocation permit from anyone to withdraw water.. The positions seemed clear to everyone." Then it goes on to talk about additional discussions.

Did discussions as described in that paragraph take place at this meeting that you attended?

A I assume they did.

Q You have no reason to dispute the characterization?

A No, sir.

Q And I think you said earlier that there were a number of instances where discussions like that occurred. Right?

A Yes, sir.

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(No. 15 - Sachs Statement 8/31/76, marked for identification.)

BY MR. RAPHAEL:

Q I'm handing you what we have just marked as Sachs exhibit 15. Can you identify Sachs exhibit 15?

A Yes, sir.

Q What is it? Is this your statement before Congress?

A Yes.

Q Before the hearing of the committee?

A Yes.

Q And attached is a proposal for the amendments to the HR 12215?

A Yes, sir.

Q In the paragraph at the bottom of this page

it reads, "Even though House Bill 12215 does not affect Virginia's rights (whatever they may be) to the Potomac, Maryland would be willing to consider several amendments which would alleviate Virginia's fears that the bill will set some sort of precedent regarding water rights. These amendments would leave open the question of Virginia's authority and second, indicate that the Low Flow Agreement pertains to the Washington Aqueduct and Maryland appropriators (again leaving open the question of whether Virginia entities are subject to Maryland authority). A copy of the amendments are attached to my written statement."

The second sentence, where it says, "These amendments would leave open the question of Virginia's authority," what did you mean by that?

A What I meant was that I wanted to get this bill through so that the diversion could be built and Fairfax could get its permit, and that I didn't think this was an appropriate time to fight over the issue of the rights of Virginia.

Q Continuing on in that sentence where you say in the second parenthetical, "again leaving open the

question whether Virginia entities are subject to Maryland authority," what was the point of that?

A Again the same point is that Virginia had questioned what Maryland's authority was and I didn't want to discuss that question in this context.

Q You wanted to postpone that issue for another day?

A That's correct. I was anxious to get this through.

(No. 19 - Ltrs Sachs/Bourassa to Gravel/Roberts 9/7/76 w/attach, marked for identification.)

BY MR. RAPHAEL:

Q Let me hand you a document that we have had marked as Sachs exhibit number 19. This is a letter signed by you and Mr. Bourassa dated September 7, 1976 to Chairman Mike Gravel of the Senate Subcommittee on

Water Resources, Committee on Public Works, and to Chairman Roberts of the Subcommittee on Water Resources. Do you recognize this?

A No. I will accept that that is its purpose.

Q And that is your signature?

A Yes, sir.

Q And the purpose of this was to inform the committee that Virginia and Maryland had reached agreement on certain issues with respect to the Low Flow Allocation statute, right?

A Yes, sir.

Q I'm sorry.

A Yes, sir.

Q And you attached a copy of the agreement, or of the proposed HR 12215 that had been agreed to?

A Yes, sir.

Q And if you look at section three of that agreement, or that bill, it says, "Except as may be provided in the agreement referred to in the first section of this Act, nothing in this Act shall alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, the

Commonwealth of Virginia, or any political subdivision thereof, the District of Columbia, or the Corps of Engineers existing on the date of enactment of this Act relative to the appropriation of water from, or the use of, the Potomac River." Do you see that?

A Yes, sir.

Q What was your understanding of the purpose of this section?

A To move on with the enactment of the necessary federal legislation.

Q But the purpose was to leave open the question of whether Maryland could apply its permitting authority to Virginia, or vice versa, or whether the Corps had such authority. It was to put off that question, right?

A That's correct.

(No. 25 - Ltr Sachs to Bourassa 8/23/77, marked for identification.)

BY MR. RAPHAEL:

Q Let me hand you what I have had marked as Sachs exhibit 25. Have you reviewed it?

A I have reviewed this, and I did see this previously. And there was another -- there was a Bourassa letter of August 5 that I was commenting on.

Q And you have seen that letter?

A Yes.

Q Let me ask you about this letter first. Is this your letter of August 23, 1977 to Colonel Bourassa?

A Yes, sir.

Q That is your signature?
A Yes, sir.
Q What was the purpose of your sending this letter?
A Responding to Mr. Bourassa's August 5th letter.
Q And what was the purpose of your doing that?
A I would have to refresh myself by looking at the August 5th letter, but I think basically he was concurring in our continuing to issue permits, but he said that -- I believe this is letter where he said at some subsequent time if Virginia adopts a permit system, they would be issuing permits to their jurisdictions. And I raised a question here and indicated that perhaps I didn't understand what he was referring to, but that we may have a legal issue; that if he was staying below the low water mark, that would be one thing; but if he was going -- if a Virginia jurisdiction wanted to withdraw water out of the Maryland section of the river, that they would still require an appropriation permit from the state. And I didn't understand what he was saying in that. And I

asked for a further clarification, and I never saw whether he responded after that.

Q All right. Are you saying it was your belief at the time that if Virginia had adopted its own permitting system and permitted users to withdraw water from the Potomac River, that you believe Maryland would still have the legal authority to impose its permitting system on Virginia users?

MS. SWEENEY: Objection. I think you have overstated his testimony.

MR. RAPHAEL: I don't mean to. I'm trying to understand what your view was.

MS. SWEENEY: If I may, I think that his testimony --

MR. RAPHAEL: I would like him to answer it.

MS. SWEENEY: All right.

THE WITNESS: What I think I said was that if Virginia, if a Virginia user, regardless of whatever kind of permit system Virginia adopted, if they wanted to take water out of that portion of the Potomac River under the jurisdiction of the State of Maryland, that jurisdiction would still require an appropriation

permit from the State of Maryland.

BY MR. RAPHAEL:

Q I think when you referred to having a legal issue at hand, what did you mean by that?

A Well, if he was questioning Maryland's authority to issue permits to Virginia users, then I would say we had a legal issue.

Q And what did you mean by that?

A Obviously, I didn't agree with him and that somewhere that had to be resolved by some legal authority.

Q Okay. That issue would have to be resolved by some legal authority?

A Yes, sir.

(No. 26 - Ltr Bourassa to Sachs 8/5/77,

marked for identification.)

BY MR. RAPHAEL:

Q Let me hand you what I have had marked as Sachs exhibit number 26. Is this the August 5, 1977 letter from Colonel Bourassa to you that was referenced in the letter we just looked at?

A Yes, sir.

Q Okay. In the second paragraph Colonel Bourassa states, "As we discussed," and goes on to talk about what he says you discussed. What discussions did you have with Colonel Bourassa?

A I can't recall.

Q Do you recall having discussions with Colonel Bourassa consistent with what is discussed in this paragraph?

A I cannot recall specifically. I know I had discussions with the colonel, but I don't recall the specific subject. I'm not disagreeing that we had the discussion on the subject as he states.

Q Okay. Did you understand Colonel Bourassa in this letter to be saying that the State Water Control Board was consenting to the Water Resources

Administration's continued administration of the waterway, water appropriation permitting system, at least until the time that the Virginia General Assembly adopted its own system?

A Yes, sir.

Q And did you have any disagreement with him about that?

A Yes, sir -- well, I asked for further explanation of -- in my August 23 letter, "I question (perhaps don't understand) the third paragraph in your letter." And I stated very clearly for the record that if the Virginia user was going into Maryland waters then they would require a permit.

Q Was that issue ever brought to a head at any time prior to this litigation?

A No, sir. Not as far as I know.

Q All right. And do you recall any discussions you had with anybody, other than your counsel in preparation for today's deposition, about these matters that are referenced in these letters?

A No. Let me kind of state for the record the situation. I was managing a program or a series of

water resource programs. My law and my direction was that you administer these programs as defined in law. The state law says I issue appropriation permits. These discussions about riparian use or any of Virginia's sovereign rights, I didn't pay a whole lot of attention to them. And I realized they existed, but I assumed that would be something that would be resolved in some other capacity. But in the meantime, I was responsible for issuing permits. As long as the Virginia users didn't object, it was not an issue in carrying out the managerial function that I had.

Q In other words, you had a job to do under the Maryland system and you were going to do that job?

A Until told otherwise.

Q Until you were told otherwise by a court or some other authority?

A That's correct.

Q Well, looking at exhibit number 34, article 3.C, the sentence would be changed to say from this, "Nothing herein shall restrict or limit such authority as the Administration," referring to the Water Management Administration, "may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River;" and then Governor Godwin's proposed addition after that is to say, "nor restrict or limit any such authority as the Commonwealth may have;...."

A Yes, sir.

Q Are you with me so far?

A Yes.

Q What is your understanding of the purpose of Governor Godwin's proposed amendment?

A Again to protect any right that Virginia thought that it had with respect to regulating water use.

Q Or issuing permits for withdrawals?

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A Yes, sir.

Q Turn to Sachs exhibit number 32, please.

A That was the final agreement, right?

MS. SWEENEY: Yes.

THE WITNESS: This is the final.

BY MR. RAPHAEL:

Q Yes, that is what you identified as the final signed Potomac River Low Flow Allocation Agreement. Turn if you would to page 19 of the agreement. In article 3.C, the second sentence reads, "Nothing herein shall restrict or limit such authority as the

Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River; nor any such authority as the Commonwealth may have; nor the authority of the Government with respect to navigable waters, including the regulation of commerce among the states and with foreign nations." Do you see that sentence?

A Yes.

Q What was your understanding of the purpose of that provision?

A Again, without belaboring what rights Virginia had, that, whatever they had, nothing in this would abridge those rights.

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Q Then if you turn to look at article 3.F, it says, "This agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages."

Let me ask you about the first half of that sentence. Do you understand what the purpose of that sentence, the first half, was?

A. I think what it means is that if one of the users wanted to obtain additional water, were seeking an increase to its existing permit, that this would not limit that.

BEST AVAILABLE COPY

Q Okay. It uses the phrase in the second line "or others subject to this agreement may have to grant or obtain permits." What do you understand the phrase "to grant" to refer to, if you know?

A Whoever would have the authority to issue permits, appropriation permits.

Q Again leaving open the question of who that might be?

A Yes, sir.

Q Did you have any personal involvement in the decision making of the Water Resources Administration in the seventies to issue a water appropriation permit to the Fairfax County Water Authority?

A Yes, sir.

Q Tell me what you recall of that.

A I recall meeting with the J. Corbalis, who, I think, was the general manager in terms of the request. I recall some technical discussions about the amount of water and the process. But I recall from our standpoint it was a normal -- other than the fact that it was a large appropriation, that it was handled under our normal procedures.

Q Okay.

A And Maryland issued its permit.

Q Without controversy?

A We had none at all.

Q The first question Ms. Sweeney asked you elicited the answer from you that your understanding throughout your career was that users of the Potomac River were required by Maryland law, which you administered, to obtain water appropriation permits.

A Correct.

Q That was a requirement of Maryland law?

A Yes, sir.

Q The issue of whether Maryland had that authority was never addressed in any court proceeding, was it?

A None that I know of.

L-453

No. 129, Original

In the

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

VIRGINIA'S BRIEF ON THE MERITS OF MARYLAND'S REMAINING CLAIMS

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Preliminary Statement

This case is about Virginia's rights to unobstructed access to the Potomac River. Those rights, implicit in federal common law, were expressly secured by Article VII of the Compact of 1785 and Clause IV of the Black-Jenkins Award of 1877. They were recognized and preserved in Article VII, § 1, of the Potomac River Compact of 1958, and in the Potomac River Low Flow Allocation Agreement of 1978. The question in this case is whether Maryland's permitting system as applied to Virginia violates those rights.

This case is not about changing the boundary line that was set by the Black-Jenkins Award, ratified by the two States and confirmed by Congress. Thus, Maryland's extensive effort to show that it has exercised jurisdiction over activities in the River on its own side of the boundary misses the point entirely. The fact that Maryland has regulated such things as liquor sales, lotteries, off-track betting and gambling, and imposed real estate taxes on a handful of properties located on its side of the boundary, is completely irrelevant to whether Virginia has the right to withdraw water from the River, or to build improvements appurtenant to property on the Virginia shore, without regulatory interference from Maryland. Those rights are specifically guaranteed by interstate compacts.

SUMMARY OF ARGUMENT

The Court should reject Maryland's argument that its inherent "police power" authority justifies applying its state permitting system to Virginia. An interstate compact approved by Congress is both a contract and a federal statute. It is to be interpreted by the standard rules of contract interpretation and statutory construction. In this case, the plain language of Article VII of the Compact of 1785, and Clause IV of the Black-Jenkins Award, gives Virginia the right to

use the River and to construct improvements from the Potomac shore; the only limitation is that such improvements not obstruct or injure the navigation of the River.

There is nothing in either interstate agreement to support Maryland's claim that it was given the right unilaterally to regulate the manner or terms by which Virginia exercises her Potomac River access rights. When Maryland and Virginia intended to create a permitting system governing their respective use of the Potomac River, they did so expressly. If the drafters and enactors of either the Compact of 1785 or the Black-Jenkins Award had intended to give Maryland the authority to regulate Virginia's withdrawal of water from the River, or its construction of improvements along the Virginia shore, they would have said so explicitly.

The "contemporaneous" evidence that Maryland offers to show that it had such authority is unpersuasive. While Maryland's 1791 law of cession granting territory for the formation of the new federal district granted commissioners the authority to require licenses for the construction of wharves or piers on the shore adjoining the new federal city, until Congress assumed jurisdiction, Maryland never required that Virginians obtain such licenses. Indeed, the fact that Maryland did not seek to apply any such licensing system to Virginia until the latter part of the twentieth century provides stronger "contemporaneous" evidence that no such system was ever intended by the drafters and ratifiers of the Compact of 1785 or the Black-Jenkins Award.

Maryland likewise misplaces its reliance on its 1853 Act granting consent for the construction of the Washington Aqueduct. The Aqueduct's intake was on the Maryland side of the River and Congress required Maryland's consent as a prerequisite to its construction. Maryland has never required a permit from the Aqueduct to withdraw water from the River, whether to supply water to the District of Columbia or to those portions of Northern Virginia also served by the Aqueduct. Even assuming for the sake of argument that Congress was

constitutionally required to obtain Maryland's consent in 1853, there is no distinguishing difference between Maryland's 1853 Act consenting to the construction of the Aqueduct, on the one hand, and Article VII of the Compact of 1785 and Clause IV of the Black-Jenkins Award, on the other, guaranteeing Virginia the right to use the River and to construct improvements from the shore. In neither case did the parties agree that Maryland would have the authority to regulate the manner or terms of such use.

Most of Maryland's remaining evidence of the parties' supposed "contemporaneous" construction of the Compact of 1785 occurred long after the boundary was settled in 1877, and has nothing whatsoever to do with water withdrawal or with the construction of improvements from the Virginia shore. Maryland's evidence that it issued water appropriation permits to Virginia users beginning in 1957 goes to its affirmative defense of prescription and acquiescence, but is clearly not "contemporaneous" evidence of what the drafters intended in the Compact of 1785 or the Black-Jenkins Award of 1877.

Maryland further argues that its right to regulate on its own side of the boundary was inherent in its territorial sovereignty and could not have been relinquished in 1785 unless Maryland did so "unmistakably." That contention is invalid for a number reasons. Most obviously, the boundary line was hotly disputed by the parties in 1785 and Virginia continued to claim that the boundary was on the Maryland shore (or at least in the middle of the River), until the arbitrators in 1877 finally settled the question. When the States agreed in 1785 to recognize one another's equal rights in the Potomac River, including the right to build wharves and improvements, they did not know where the boundary line ultimately would be drawn. They nonetheless agreed in Article VII of the Compact of 1785 that their rights of equal access would continue "forever." When the States submitted the boundary dispute to arbitration in 1874, they

likewise agreed, no matter where the line was finally drawn, that neither State nor its citizens would be deprived of any of the rights and privileges enumerated in the Compact of 1785. Thus, the historical predicate is totally lacking for Maryland's claim that it could not have "given up" sovereign rights in 1785 unless it said so expressly. Maryland's claim to sovereignty was merely inchoate at the time, just as Virginia's was, and the question of which state ultimately would win the boundary contest would not be settled for nearly another hundred years.

Maryland's argument based on the "unmistakability" doctrine is also misplaced because the doctrine does not apply in interstate compact cases. The doctrine derives from the concept that one legislature cannot bind a future legislature because the two are of equal dignity. Neither the doctrine nor its rationale applies in cases like this one, where an interstate compact approved by Congress is transformed into a federal law that explicitly binds the signatory states and prevents either of them from revoking the compact except with Congress' further approval.

Maryland's argument is also based on the erroneous assumption that, in the absence of an interstate compact, Maryland would be entitled to apply its own state law, whether judge-made or the product of the Maryland legislature, to the terms of Virginia's Potomac River access. To the contrary, federal common law would govern Virginia's access rights even if there were no interstate compact that clearly spelled out those rights. Federal common law is based on the principle of equality of right, and the laws of one state cannot control the use of an interstate river by another state.

The framers of the Constitution vested original jurisdiction in this Court to resolve controversies between states over issues like this because no one state could be expected to be impartial in a controversy with a sister state, nor responsive to the concerns of the citizens of the other state. Constitutional theory predicts that one state will be incapable, systemically, of fairly

protecting the interests of both states. That prediction is borne out in this case by, among other things, the recent efforts of the Maryland legislature to restrict Virginia's water withdrawals from the Potomac River in order to curb what Maryland legislators believed to be excessive urban development and economic growth in Northern Virginia.

Any interest that Maryland has in regulating its own citizens' water withdrawals is not a valid consideration that justifies requiring Virginia to submit to Maryland's permitting authority. A negotiated system of equitable apportionment specified by Congress already governs the water rights of Maryland, Virginia and the District of Columbia: the Potomac River Low Flow Allocation Agreement of 1978 ("LFAA"). That interstate compact, not Maryland's permitting system, would apply in the event of a severe water shortage. When water is not scarce, and the LFAA is not in effect, Virginia has a right to divert water from the River, both under federal common law and under her interstate compacts with Maryland.

Even if she had filed an original action against Virginia, Maryland could not restrict Virginia's diversions from the River without showing, by "clear and convincing evidence," that such diversions would cause Maryland "real or substantial injury." Given the LFAA and the efforts of the three largest suppliers of water to the Washington Metropolitan Area, Maryland could never make such a showing. Maryland should not be allowed to achieve unilaterally, through the expedient of a "permitting" system that can be used to restrict Virginia's access, what Maryland could not achieve through litigation in this Court.

Maryland's second argument -- that Virginia has lost her compact rights through prescription and acquiescence -- should be rejected both as a matter of law and on its factual merits. Maryland's affirmative defense does not apply where, as in this case, the parties' respective rights have been determined by an interstate compact approved by Congress.

Congressional consent transforms the compact into a law of the United States, binding on the signatory states under the Supremacy Clause. Without Congress' further consent, neither state can alter or change that federal law, whether through direct legislative action, or through the indirect, "equitable" doctrine of prescription and acquiescence.

Maryland's defense also fails as a matter of law because the time period of the alleged prescription and acquiescence is historically too brief to cause Virginia to lose rights that have been protected by interstate compact for 217 years. Most of this Court's cases invoking the doctrine have involved boundary disputes in which one state acquiesced in the other's exercise of territorial sovereignty for multiple generations, and usually for longer than 100 years. The primary evidence supporting Maryland's defense in this case consists of permits issued by Maryland authorities to Virginia citizens or localities beginning, at the earliest, in 1957. While the Court has not established a minimum period of time that must elapse for the defense to be viable, there is no precedent that even comes close to supporting the application of the doctrine in this case.

Maryland's defense also fails as a matter of law because it is based entirely on the conduct of Virginia citizens, localities and state and local government officials. None of Maryland's evidence demonstrates that the Virginia General Assembly has waived, or acquiesced in the relinquishment of, any of Virginia's interstate compact rights. Under both Virginia state law and this Court's prior decisions involving an alleged waiver of the sovereign's rights by virtue of the conduct of its officials, only the Virginia legislature would have the authority to waive or alter Virginia's interstate compact rights. Far from engaging in any such conduct, the General Assembly expressly reaffirmed Virginia's rights in the Potomac River Riparian Rights Act of 1979.

Maryland's evidence of prescription and acquiescence is also factually inadequate to carry Maryland's heavy burden of proof. Evidence that Maryland has taxed a handful of properties on the Maryland side of the boundary actually backfires. Those properties are owned by private individuals whose deeds grant them title in the riverbed on the Maryland side of the boundary. Much more probative is the fact that Maryland has *not* imposed real property taxes on the *hundreds* of wharves, piers, and other structures that extend from the Virginia shore across the boundary line, but which are taxed by Virginia localities.

Maryland's evidence based on permits issued to Virginia users for water appropriation and waterway construction also fails to sustain its affirmative defense. As a starting point, Maryland should be estopped from basing its defense on prior permit applications. Until it opposed Virginia's original action filing in April 2000, Maryland had never contended that its issuance of permits to Virginia users had caused Virginia to lose her interstate compact rights or the right to contest Maryland's permitting authority. To the contrary, Maryland took the position in this case that the validity *vel non* of its permitting authority would not even be implicated unless and until Maryland used its permit system to deny any Virginian access to the Potomac River. Ironically, Maryland even took the position, in the recently concluded administrative proceeding involving the Fairfax County Water Authority, that its prior issuance of permits to Virginia users showed that Maryland was *respecting* Virginia's compact rights. Maryland never contended in that case that those prior permits actually abrogated Virginia's rights.

Maryland's permit evidence, even on its own terms, is too weak to prove that Virginia's rights have been lost. While repeatedly noting that its permitting system was adopted in 1933, Maryland fails to point out that the statute did not apply facially to Virginia users of the Potomac River until its language was amended in 1973. Although it is unclear why a handful of Virginia

applicants felt the need to apply to Maryland for permits prior to 1973, Virginia, in any event, repeatedly made clear to Maryland in 1976, and throughout the 1970s, that she disputed Maryland's authority to apply its permitting system to Virginia. Those discussions surrounded the enactment of what became § 181 of the Water Resources Development Act of 1976 -- which called for the creation of the LFAA. Maryland agreed to amendments in the language of both § 181 and the LFAA specifically to "leave open" the controversy and to preserve Virginia's rights. Virginia then specifically reaffirmed her rights in statements made in public hearings conducted by Congress and the U.S. Army Corps of Engineers, as well as in the Virginia Potomac River Riparian Rights Act of 1979. The dormancy of the controversy in the 1980s through the mid-1990s was evidence only of the absence of a justiciable case or controversy, not evidence that Virginia had relinquished her interstate compact rights.

Maryland's evidence based on its waterway construction permits also carries little weight. It must be discounted heavily, if not entirely, by the fact that Virginians seeking to construct improvements in the Potomac River have had to obtain federal permits from the U.S. Army Corps of Engineers. Since 1972, the Clean Water Act has required, as a matter of federal law applicable in every state, that the applicant obtain a § 401 water quality certification from the State in which the construction will take place that the work will not violate state water quality standards. The first time Maryland used its permitting authority to block a § 401 certification was in 1997, when it refused to issue *both* a § 401 certification and a waterway construction permit to the Fairfax County Water Authority. Until that occurred, there was no need to focus attention on whether Maryland could impose any *state* permit requirements on Virginia users beyond the § 401 requirement imposed by federal law.

Given this context, the issuance of waterway construction permits to Virginia applicants, whether called a "waterway construction permit" or a "tidal wetlands license," is inadequate to cause Virginia to lose her historic compact rights. While Maryland has issued many more permits for work in the tidal Potomac than in the non-tidal Potomac, the greater number does not carry greater weight. Maryland has exempted most Virginia construction projects in the tidal Potomac from its permitting requirements, providing scant support for the claim that it has been heavily regulating Virginia's access to the tidal waters since the early 1970s. The fact that staff members of the Virginia Marine Resources Commission in recent years have routinely forwarded copies of Virginia construction applications to both Maryland and the U.S. Army Corps of Engineers is hardly probative of any acquiescence in Maryland's authority to issue anything beyond a § 401 water quality certification. The VMRC staff transmitted files to Maryland and the Corps simply as a matter of administrative comity and convenience, and not as a recognition or acknowledgement of any particular legal authority that the Maryland agencies might possess. None of that activity reflected any policy decision by the VMRC.

Maryland's last category of evidence -- opinions of the Virginia Attorney General -- likewise fails to show that Virginia has ever given up her right to construct improvements from the Virginia shore or acquiesced in Maryland's permitting authority. To the contrary, the Virginia Attorney General has affirmed Virginia's right to construct such improvements and pointed out that Virginia's historic compact rights apply both in the tidal Potomac as well as above tidewater.

Assuming for the sake of argument that Maryland's defense is not legally foreclosed, the question at the end of the day would be whether the events of the past three decades are sufficient to give Maryland the right to forever regulate and control Virginia's access to the

Potomac River. The answer must be "no." Proceedings under this Court's original action jurisdiction are equitable, and the doctrine of prescription and acquiescence is itself an equitable one. Under the facts of this case, no court of equity could condone giving Maryland control over Virginia's access to this crucial interstate river. Allowing one State to control its sister state's access to a vital interstate stream would be unprecedented in this Court's jurisprudence. It would run counter not only to the Maryland/Virginia compacts in question, but to the "cardinal" rule that the states stand on a level of complete equality with respect to their rights to appropriate water from an interstate stream.

BACKGROUND

Prior briefing in this case has focused on historic events occurring from 1606, when James I granted the first charter to Virginia, until 1958, when Maryland and Virginia executed the Potomac River Compact of 1958. Two pieces of recent history, by contrast, are important to resolving the merits of Maryland's remaining claims. First, the events surrounding the enactment of Section 181 of the Water Resources Development Act of 1976, and the Potomac River Low Flow Allocation Agreement of 1978 (the "LFAA"), are relevant to evaluating Maryland's "police power" argument and its defense of prescription and acquiescence. That history is important because Maryland expressly acknowledged in the mid-1970s that it was an "open question" whether Maryland could regulate Virginia's Potomac River access rights. Indeed, Virginia made its position clear, both at the time and thereafter, that Maryland had no such authority. Second, the recent efforts of the Fairfax County Water Authority to build an offshore drinking water intake in the Potomac River, and Maryland's open hostility to that project, provide an important case study demonstrating one state's systemic inability to protect another state's interest in an interstate stream.

A. THE POTOMAC RIVER AS A WATER SUPPLY SOURCE.

The Potomac River basin covers 14,670 square miles, of which Virginia accounts for 39 percent, and Maryland 26 percent.[1] The Shenandoah River contributes, on average, 29 percent of the flow of the Potomac River as measured at Point of Rocks, just upstream from the Washington Metropolitan area municipal intakes.[2] It is the single largest upstream tributary of the Potomac River, with more than twice the annual average flow of the North and South Branches combined.[3]

The Potomac River is the most important source of fresh drinking water for the Washington Metropolitan area.[4] The three major water suppliers for the region are the Washington Aqueduct Division of the U.S. Army Corps of Engineers (the "Aqueduct" or

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[1] Interstate Commission on the Potomac River Basin, *2000 Annual Report* 9 (May 2001) [VX 265]; Potomac River Basin Report, H.R. Doc. 343, 91st Cong., 2d Sess. 33 (1970) (Report of the Board of Engineers for Rivers and Harbors dated 12/16/1963) [VX 268]. All citations to "VX __" in Virginia's Brief on the Merits refer to the tab numbers assigned to Virginia's exhibits. Exhibits 1-124 were previously submitted in support of Virginia's motion for partial summary judgment, by letter to the Special Master dated February 27, 2001.

[2] *See* 1 United States Geological Survey, *Water Resources Data, Maryland and Delaware, Water Year 2000* (Water Data Report MD-DE-00-1) 42, 333, 337 (March 2001) [VX 273]. The annual mean flow of the Shenandoah River, measured at Millville, West Virginia, for the years 1895-1909 and 1928-2000, was 2,762 cubic feet per second (cfs). *Id.* at 333. The annual mean flow of the Potomac River, measured at Point of Rocks, Maryland, for the years 1895-2000, was 9,514 cfs. *Id.* at 337. The ratio of the two flows represents the percentage contribution from the Shenandoah to the free flowing Potomac as measured at Point of Rocks. The ratio is 29 percent (2,762 ÷ 9,514).

[3] Compared to an annual average flow in the Shenandoah River of 2,762 cfs, the annual average flow of the North Branch is 1,296 cfs, and 1,342 cfs for the South Branch. *Id.* at 305, 313. The other upstream tributaries contribute relatively minor quantities of water measured in annual average flow: 587 cfs for the Cacapon River, *id.* at 319; 606 cfs for the Conococheague, *id.* at 323; and 288 cfs for Antietam Creek, *id.* at 331.

[4] *See generally* Department of the Army, Baltimore District, Corps of Engineers, *Metropolitan Washington D.C. Area Water Supply Study, Maryland, Virginia, and the District of Columbia: Main Report* 7-8 (Sept. 1983) [hereinafter "WMA Water Supply Study"] [VX 259].

"WAD"), the Washington Suburban Sanitary Commission ("WSSC"), and the Fairfax County Water Authority ("FCWA").[5] The WSSC supplies Montgomery County and Prince George's County, Maryland, with treated water drawn from the Potomac River and the Patuxent Reservoir.[6] The Aqueduct provides treated water drawn from the Potomac River for the District of Columbia and portions of Northern Virginia, including Arlington County and the City of Falls Church.[7] The FCWA supplies treated water, drawn from the Potomac River in the north, and from the Occoquan River in southern Fairfax County, to another 1.2 million Northern Virginians.[8]

Most of the residents of the Washington Metropolitan area currently rely on the Potomac River as their primary source of drinking water.[9] On average, the Potomac River accounts for about 75 percent of the water treated by the three main suppliers.[10] The Potomac River is the sole water supply for the Aqueduct. By contrast, the Occoquan and Patuxent reservoirs, available to the FCWA and the WSSC respectively, meet the remaining 25 percent of the current regional demand served by those water suppliers.[11]

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[5] Bill of Complaint ¶ 11 (second sentence); Answer ¶ 11 (admitted).

[6] Bill of Complaint ¶ 11 (third sentence); Answer ¶ 11 (admitted).

[7] Interstate Commission on the Potomac River Basin, Report No. 00-6, *Year 2000 Twenty-Year Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area* 2-1 (October 2000) (Erik R. Hagen, Roland C. Steiner) [hereinafter "Hagen & Steiner"] [VX 264].

[8] Hagen & Steiner, *supra* note 7, at 2-1, 2-2 [VX 264].

[9] *Id.* at 2-2.

[10] *Id.*

[11] *Id.*

Congress authorized the Aqueduct to supply water to Arlington County, Virginia in 1926.[12] The Aqueduct constructed a 24-inch water main from its Dalecarlia plant to the Chain Bridge, where it was connected to the Arlington County system.[13] Arlington County began receiving water in 1927.[14] In 1947, Congress authorized the Aqueduct to extend service to the City of Falls Church, Virginia, "or to any other competent state or local authority in said metropolitan area in Virginia."[15] Falls Church began receiving water from the Aqueduct later that year.[16] The Aqueduct has never been subject to Maryland's water appropriation permitting authority, whether for itself, the District of Columbia, or the Virginia localities it supplies.[17]

B. THE LOW-FLOW ALLOCATION AGREEMENT.

1. Concerns in the 1960s.

The first regional approaches to water supply management for the Washington Metropolitan Area began in the 1960s when concerns emerged that available water supplies would not be sufficient to meet regional demands.[18] In 1962, Congress approved the

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[12] Act of Apr. 14, 1926, ch. 140, Pub. L. No. 69-118, § 1, 44 Stat. 251 (1926) [VX 286]. *See* Harry C. Ways, *The Washington Aqueduct, 1852-1992*, at 105, 129-30 (1992) [VX 282].

[13] *Ways, supra* note 12, at 105, 129-30 [VX 282].

[14] *Id.* at 105, 129-30.

[15] Act of June 26, 1947, ch. 149, § 1, Pub. L. No. 80-118, 61 Stat. 181 (1947) [VX 287].

[16] *Ways, supra* note 12, at 130 [VX 282].

[17] Deposition of Herbert M. Sachs at 74-75 [VX 139]; Deposition of Mathew G. Pajerowski at 111 [VX 140]; Md. Ex. X ¶ 74 (stating that the Aqueduct "claims exemption from the requirement to obtain a Maryland water appropriation permit. . . .").

[18] Hagen & Steiner, *supra* note 7, at 1-2 [VX 264]; Potomac River Basin Report, H.R. Doc. 343, *supra* note 1, at 38 (Report of the Board of Engineers for Rivers and Harbors dated 12/16/1963) [VX 268].

construction of the Bloomington Dam, with a portion of the storage capacity allocated to water supply.[19] As of 1963, some 16 major dam and reservoir projects were proposed by the Army Corps of Engineers on the Potomac River, including Bloomington.[20] During drought conditions in the summer of 1966, the flow in the Potomac River was less than projected future demands.[21] Nonetheless, by May 1970, support for so many projects had waned, and the Secretary of the Army recommended to Congress that the federal government proceed with the Bloomington, Sixes Bridge and Verona reservoir projects, as "a marginal interim solution" to the area's water supply problems.[22] Neither the Sixes Bridge nor the Verona projects were built.[23] The Bloomington reservoir project did not become operational until September 1981.[24]

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[19] Potomac River Basin Report, H.R. Doc. 343, *supra* note 1, at 34 [VX 268]. The dam is located on the North Branch of the Potomac River approximately two miles above the confluence with the Savage River. The reservoir straddles the Mineral County, West Virginia and Garrett County, Maryland boundary.

[20] H.R. Doc. No. 343, *supra* note 1, at 1 (Report of the Chief of Engineers dated 2/26/1969) [VX 268]; *id.* at 55 (Report of the Board of Engineers for Rivers and Harbors dated 12/16/1963); *id.* at 59 (Report of the District Engineer dated 2/28/1963 at 29-31, 40); Hagen & Steiner, *supra* note 7, at 1-2 [VX 264].

[21] Hagen & Steiner, *supra* note 7, at 1-2 [VX 264]; H.R. Doc. No. 343, *supra* note 1, at 4 (Report of the Chief of Engineers dated 2/26/1969) ("The urgency of the water supply situation is most apparent when the dependable (minimum) flow of 580 cubic feet per second during the 1966 drought is compared with the projected average monthly requirements, for the Washington Metropolitan Area, of 595, 930, 1,380 and 1,600 cubic feet per second in year 1965, 1980, 2000, and 2010, respectively.") [VX 268].

[22] H.R. Doc. No. 343, *supra* note 1, at vi-vii (Letter of 5/27/70 from Sec'y Resor to Speaker McCormack) [VX 268]; Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, the Environment, and the International Community, and the House Comm. on the District of Columbia, 94th Cong., 2d Sess. 37 (1976) (Subtitled "*On the State of the Potomac River, 1976, as to Water Supply and Water Pollution, and on H.R. 15434, to Provide for Equitable Water Rates and Encourage Water Conservation*") (Statement of Brig. Gen. McGarry) [VX 269]; *see also Ways, supra* note 12, at 133 ("Early in the 1960s, Corps water resources planning had produced a development plan calling for 16 multipurpose upstream impoundments. Because of opposition this plan was reduced to the 'Six Pack.' Ultimately, only one upstream reservoir, the Bloomington Lake Project was built.") [VX 282].

2. The Proposed Potomac River Basin Compact.

Reacting to the increasing federal interest in water resources management in the Potomac River basin, the Governors of Maryland, Virginia, West Virginia and Pennsylvania, and the President of the D.C. Board of Commissioners, met in Washington, D.C. in April 1965, to discuss means to protect the states' interests in the Potomac River.[25] That meeting led to the creation of the Potomac River Basin Advisory Committee, comprised of three representatives from each jurisdiction.[26] In October 1968, after several years of drafting, the Advisory Committee prepared and recommended a new interstate agreement called the "Potomac River Basin Compact."[27] (This compact should not be confused with the 1940 interstate compact that created the "Interstate Commission on the Potomac River Basin," discussed *infra* Background, Part C.)

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[23] *See, e.g.*, WMA Water Supply Study, *supra* note 4, at 1 [VX 259]; District of Columbia Water Supply, Hearing before the Subcomm. on Gov'l Efficiency & the District of Columbia of the Senate Comm. on Gov'l Affairs, 96th Cong., 1st Sess. 112, 123-24 (October 10, 1979) (explaining lack of funding and support for the projects) [VX 260].

[24] *Ways*, *supra* note 12, at 133 [VX 282].

[25] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 644 (Statement of Roy Orndorff, Exec. Dir., Potomac River Basin Advisory Committee) [VX 269]; Report of the Virginia Advisory Legislative Council to the Governor and the General Assembly of Virginia, *The Proposed Potomac River Basin Compact* 68 (1970) ("The prospect of extensive federal action to control the water resources of the Potomac Basin stimulated activity on the part of the states concerned.") [VX 270].

[26] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 644 [VX 269]; Report of the Virginia Advisory Legislative Council, *supra* note 25, at 68 [VX 270].

[27] Potomac River Basin Advisory Committee, *Potomac River Basin Compact* (October 1968) [VX 267]; *see also* Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 645 [VX 269]; Report of the Virginia Advisory Legislative Council, *supra* note 25, at 69 [VX 270].

The Potomac River Basin Compact would have created an interstate commission responsible for, among other things, developing water supply storage on the Potomac River and establishing a comprehensive water resources plan for management and use of water from the River.[28] The commission would have had the power to regulate water appropriations and to restrict diversions of water from the River.[29] It would also have had the power to regulate the construction, operation and management of projects affecting the water resources of the basin.[30]

Virginia adopted the Potomac River Basin Compact in 1970.[31] Maryland followed suit in 1971.[32] However, a West Virginia study commission recommended in 1972 that the state not adopt the compact.[33] Pennsylvania took little action on the proposal.[34] In light of those developments, the Advisory Committee in 1974 began exploring a smaller, regional compact to include Virginia, Maryland, the District of Columbia and the United States.[35]

Maryland ultimately repealed its adoption of the Potomac River Basin Compact in 1987.[36] Virginia repealed its adoption in 1990.[37] In 1976, however, the legislatures in both

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[28] Potomac River Basin Compact, Art. 3, § 3.02, Art. 4 [VX 267].

[29] *Id.* Art. 3, §§ 3.05(g), (i); Art 11.

[30] *Id.* Art. 3, §§ 3.05(d), 3.08.

[31] 1970 Va. Acts ch. 464 [VX 295]; *see also* Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 645 [VX 269].

[32] 1971 Md. Laws ch. 30 [VX 322].

[33] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 645 [VX 269].

[34] *Id.*

[35] *Id.*

[36] 1987 Md. Laws ch. 234 [VX 324].

states had referred the question of a smaller, regional compact for further study to the next session of their respective legislatures.[38] This was the state of affairs in the summer of 1976, when Congress conducted hearings concerning how to equitably allocate the flow of the Potomac River during drought conditions.[39]

3. The Corps Blocks the WSSC Water Diversion Structure.

By the late 1960s, the WSSC had plans underway to expand its water facilities. The WSSC had been withdrawing water from the Potomac River since October 1961.[40] However, its intake was not adequate to withdraw water during periods of low flow. The WSSC wanted to build a water diversion structure, or weir, for the purpose of improving water withdrawals during drought periods.

The WSSC's project required a federal permit under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The Army Corps of Engineers, however, refused to issue a permit until a regional plan was in place establishing a legally enforceable agreement for equitably apportioning Potomac River water during low flow periods. Colonel McGarry of the Department of the Army wrote to the Maryland Secretary of Natural Resources that the Corps of Engineers "will never withdraw their objections to construction of the weir until there is an act of Congress that establishes some federal agency that can immediately take action to prevent non-

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[37] 1990 Va. Acts ch. 179 [VX 300].

[38] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 645 [VX 269].

[39] *See infra* text accompanying notes 26-86.

[40] 1 United States Geological Survey, *Water Resources Data, Maryland and Delaware, Water Year 2000* (Water Data Report MD-DE-00-1) 352 (March 2001) [VX 273].

federal interest [sic] from draining the river dry and preventing Washington Aqueduct from meeting their statutory requirements."[41]

Discussions ensued from late 1975 through early 1976 between Maryland and the Department of the Army concerning the text of the proposed federal low-flow statute.[42] On February 9, 1976, the WSSC formally requested Congressman Gilbert Gude (Md.) and Senator J. Glenn Beall, Jr. (Md.) to introduce the legislation in Congress.[43]

4. Section 181 of the Water Resources Development Act of 1976.

On March 2, 1976, Representative Gude introduced H.R. 12215. Senator Beall introduced S. 3326, a companion bill, on April 26, 1976. The draft bill authorized construction of the WSSC weir provided that "the State of Maryland, the Washington Suburban Sanitary Commission, and such other governmental authorities as the Department of the Army and the State of Maryland deem desirable signatories, have entered into a written agreement providing for an enforceable schedule for the allocation and withdrawal of water by any entity during periods of low flow. . . ." H.R. 12215 § 1.

Neither the Commonwealth of Virginia nor any Virginia entity was mentioned anywhere in the draft bill. Section 3 of the draft further provided:

> Except as provided for in the agreement specified in the first section, this Act shall not alter the authority of the State of

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[41] *See* Letter from McGarry to Coulter dated 12/23/74, at 3 [MD-MDE-16439-42] [VX 145]; Letter from McGarry to Coulter dated 9/26/75 [MD-MDE-22086-87] [VX 146].

[42] *See* Letter from Coulter to McGarry dated 12/16/75 [MD-MDE-16433-35] [VX 147]; Letter from McGarry to Coulter dated 1/19/76 [MD-MDE-22035-36] [VX 148].

[43] Letter from Peterson to Gude dated 2/9/76, attaching legislation [MD-MDE-22002-04] [VX 149]; Letter from Peterson to Beall dated 2/9/76, attaching legislation [MD-MDE-22023-28] [VX 150].

> Maryland or the Corps of Engineers relative to the appropriation of water from the Potomac River.

Id. § 3. This language was requested by the Maryland Department of Natural Resources[44] and copied nearly verbatim from Maryland's December 16, 1973 proposal to the Corps.[45]

The proposed legislation was discussed in several congressional hearings in 1976, attended by representatives from Maryland, Virginia and the Corps. The first set of hearings, before a House of Representatives subcommittee on June 1, 1976, concerned the state of the Potomac River generally.[46] Brigadier General Robert S. McGarry explained the purpose of the bill and noted that it was drafted in order to leave open the question of whether Maryland had authority to regulate the allocation of water from the Potomac River:

> We have a need to protect our customers from having the water upstream from us withdrawn and we can't have it. On a technical level we never had any argument on the allocation formula. We resolved that almost 2 years ago. *The argument since then has been jurisdictional argument whether the State of Maryland has jurisdiction over that water and the right to allocate it.*
>
> As you know, Maryland owns the Potomac. Their border goes to the far shore of the river and they feel they do have the right to allocate the water. *The Federal Government has not accepted that position.*
>
> In my opinion this act authorizes the Federal Government, namely, the corps, to enter into an agreement to share it during periods of low flow.

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[44] Letter from Peterson to Beall dated 2/9/76, at 3 ("Section 3 is included in the draft Bill at the request of the State of Maryland (Department of Natural Resources) to reflect that the Bill, if enacted, 'shall not alter or change the authority of the State of Maryland or the Corps of Engineers relative to the appropriation of water from the Potomac River.'") [VX 150].

[45] Letter from Coulter to McGarry dated 12/16/75 at 3 [MD-MDE-16433-35] [VX 147].

[46] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22 [VX 269].

> Rep. Gude. So, as long as we agree that Maryland owns the river, we can divide up its waters?
>
> General McGarry. I don't think the act is worded that way. We intended to word it so it does not decide whether or not they own the water because *I think the Virginia interests among others would object to an act that said for ever and ever Maryland owned and could allocate that water.*[47]

General McGarry also commented about the Maryland requirement that Virginia users such as the FCWA obtain a permit from Maryland in order to construct a water intake in the Potomac River, noting that the legal validity of Maryland's permitting authority was open to question:

> Mr. Harris [Rep., Va.]. What is the process we go through regionally here to determine whether or not Fairfax County should put another water intake in or if somebody upstream further decides to put one in, what is the process?
>
> General McGarry. A long, slow, torturous process. They will need a permit from the corps to build the structure in the Potomac. They will also need a permit from Maryland *in Maryland's viewpoint--I am not sure Virginia agrees.*[48]

On June 25, 1976, Virginia's Secretary of Commerce and Resources, Earl Shiflett, testified, on behalf of Virginia, that the Compact of 1785 "guaranteed its rights in the Potomac River."[49] At the time of his appearance, Virginia had yet to take a formal position on the bill. On June 29, 1976, however, the Virginia State Water Control Board decided to oppose the legislation as drafted because "Virginia's ancient water rights in the Potomac River are not

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[47] *Id.* at 22 (emphasis added). Representative Gude (Md.) was the ranking minority member on the subcommittee. *Id.* at 2.

[48] *Id.* at 31-32 (emphasis added).

[49] *Id.* at 681, 693-94.

recognized in the Bill," and because the bill did not provide for Virginia's participation.[50] However, by letter dated July 21, 1976, Secretary Shiflett advised the House subcommittee that Virginia supported the concept of an equitable allocation of the flows of the River.[51] He stated that "Virginia has not participated in the drafting of the proposed low flow agreement but is prepared to work with Maryland, *et al.* in developing an agreement which will be effective and which will also protect Virginia's historic rights to use of Potomac River flows."[52]

The day before this letter was sent, Eugene Jensen, the Executive Director of the Virginia State Water Control Board, wrote to Herbert Sachs, the Director of the Maryland Water Resources Administration, stating:

> Virginia does not have a permit system for allocation of water. Virginia courts presently determine what is reasonable use... *It should be stated for the record, that Virginia has not recognized the Maryland permit and appropriation authority* for Virginia waters nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785.[53]

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[50] Letter from Jensen to Godwin dated 7/20/76, at 2 [VA-SRC-002654-57] [VX 156]. The SWCB specifically worried that if the bill were enacted in its then present form, it "might deprive Virginia of its riparian rights to the waters of the Potomac River as guaranteed by the 1785 Compact between Virginia and Maryland and the Arbitration Award of 1877 which was approved by the Congress of the United States. . . ." *Id.* at 1.

[51] Potomac River, Hearings & Markup Before the Subcomm. on Bicentennial Affairs, *supra* note 22, at 703 [VX 269].

[52] *Id.*

[53] Letter from Jensen to Sachs dated 7/8/76 [VA-GEN-00224-225] (emphasis added) [VX 155].

On August 5, 1976, the Senate Subcommittee on Water Resources conducted hearings on the companion bill, S. 3326.[54] Representative Gude testified that, "[i]n retrospect, it was politically unwise for the Corps and the State of Maryland to negotiate the means to accomplish a low-flow agreement without including the Commonwealth of Virginia, which has a riparian interest in the Potomac. . . ."[55]

Gude proposed a revised bill in response to Virginia's concerns.[56] He advocated that only the municipalities taking or proposing to take water from the River be required to sign a low flow agreement, and he urged that neither Maryland nor Virginia be made a party to it.[57] He opposed making Virginia a party for fear that it had a "hidden agenda" that would delay approval of the WSSC weir.[58] Gude's alternative proposal also changed the "savings" language of § 3 to read:

> Except as may be provided in the agreement referred to in the first section of this act, nothing in this Act shall alter any riparian rights or other authority of the State of Maryland, or any political subdivision thereof, the Commonwealth of Virginia, or any political subdivision thereof, the District of Columbia, or the Corps of Engineers existing on the date of enactment of this Act relative to the appropriation of water from, or the use of, the Potomac River.[59]

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[54] Omnibus Water Resources Development Act of 1976, Hearings before the Subcomm. on Water Resources of the Senate Comm. on Public Works, 94th Cong., 2d Sess. 2008-2229 (1976) [hereinafter "Senate Hearings, Omnibus Water Resources Development Act."] [VX 266].

[55] *Id.* at 2009.

[56] *Id.*

[57] *Id.* at 2011, 2012-13.

[58] *Id.* at 2011.

[59] *Id.* at 2013.

Gude emphasized that the purpose of this amendment was to preserve Virginia's rights in the Potomac River.[60] His statement was echoed by Warren Rich, an assistant attorney general for Maryland.[61] Rich testified: "This agreement and the bill before you today in no way would affect or detract or take away any riparian rights of the State of Virginia. We recognize that the State of Virginia has riparian rights, and those rights are equivalent or equal to the riparian rights of Maryland communities, and there is no intent to take anything away from the state of Virginia."[62]

The Chairman of the Virginia State Water Control Board, J. Leo Bourassa, testified following Rep. Gude.[63] Bourassa stated that Virginia was opposed to S. 3326, as drafted, because it did not recognize Virginia's rights under the Compact of 1785 or the Black-Jenkins Award of 1877, and did not include Virginia or its political subdivisions as parties.[64] He also urged that the legislation be expanded to include provisions governing the allocation of costs for stored water to be released from Bloomington and Verona, and for the allocation of reused water

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[60] *Id.* at 2009 ("My proposal . . . broadens the 'status quo' language of section 3 to make it clear that nothing in the legislation is intended to alter the riparian rights or other authority of Maryland, Virginia, their political subdivisions, the District of Columbia, or the corps relative to using or appropriating waters from the Potomac River."); *id.* at 2012 ("My legislation does not alter any riparian rights of the various parties with respect to their authority to appropriate water from the Potomac.").

[61] *Id.* at 2102 (Statement of Ass't Att'y Gen. Warren Rich).

[62] *Id.*

[63] *Id.* at 2067-75.

[64] *Id.* at 2068.

in the Potomac estuary.[65] Virginia's State Water Control Board issued a press release about Col. Bourassa's testimony stating "Virginia today laid claim to Potomac River water rights which were given to the state in 1785 by a compact between Virginia and Maryland."[66]

On August 16, 1976, representatives from Virginia and Maryland, including Bourassa and Herbert Sachs, met in person in an attempt to resolve their differences.[67] A contemporaneously prepared memorandum of the meeting reported:

> Stated bluntly, the positions still remain unchanged with Maryland's Attorney General maintaining that Maryland owns the Potomac and has the right to allocate water through their permit system; and *with Virginia's position as expressed by SCWB Chairman Bourassa that Virginia has vested rights to Potomac Water and does not need to have an allocation permit from anyone to withdraw water.*[68]

Sachs conceded in his deposition in this case that "there were a number of instances where discussions like that occurred."[69]

On August 31, 1976, the state representatives were back on Capitol Hill, this time before the House Subcommittee on Water Resources.[70] Maryland's Rep. Gude reiterated that he had

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[65] *Id.* at 2068. Although plans to develop the estuary were underway in 1976, they were later abandoned in 1985. For a brief history of those plans, *see* Ways, *supra* note 12, at 137-40 [VX 282].

[66] SWCB News Release issued 8/5/76 [VA-SRC-02260-61] [VX 157].

[67] Memorandum from Jones to Jensen dated 8/17/1976 [Sachs Dep. Ex. 11] [VX 158].

[68] *Id.* (emphasis added). Sachs did not dispute the accuracy of this memorandum. Sachs Dep. at 129-31 [VX 139].

[69] Sachs Dep. at 131 [VX 139]; *see also id.* at 81-82, 105-06, 107-08, 178-79.

[70] Water Resources Development Act of 1976, Hearings before the Subcomm. on Water Resources of the Comm. on Public Works & Transportation, 94th Cong., 2d Sess. 363, 427-47 (August 31, 1976) [hereinafter "House Hearings, Water Resources Development Act of 1976"] [VX 274].

amended his proposal to "make it clear that the bill does not purport to deny Virginia, or her political subdivisions, any riparian rights that they presently have."[71] Herbert Sachs appeared on behalf of Maryland at the request of Governor Marvin Mandel.[72] His statement to the Committee included the following:

> Even though House Bill 12215 does not affect Virginia's rights (*whatever they may be*) to the Potomac, Maryland would be willing to consider several amendments which would alleviate Virginia's fears that the bill will set some sort of precedent regarding water rights. These amendments would *leave open* the question of Virginia's authority and second, indicate that the low flow agreement pertains to the Washington Aqueduct and Maryland appropriators (*again leaving open the question of whether Virginia entities are subject to Maryland authority*).[73]

Sachs discussed his congressional testimony in his deposition in this case. He explained that "Virginia had questioned what Maryland's authority was and I didn't want to discuss that question in this context."[74] Sachs wanted to "postpone that issue for another day."[75]

Eugene Jensen, on behalf of Virginia, testified before the subcommittee that Congressman Gude's changes to the bill were "in the right direction," but that the State Water Control Board had not yet had a chance to discuss the matter.[76] He said the Board "would like to find a solution which we could be assured would protect Virginia's water rights in the Potomac

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[71] *Id.* at 429 (Statement of Rep. Gude).

[72] *Id.* at 438; Sachs Dep. Ex. 15 at 1 [VX 161].

[73] Sachs Dep. Ex. 15, at 3 (emphasis added) [VX 161]; House Hearings, Water Resources Development Act of 1976, *supra* note 70, at 438 (emphasis added) [VX 274].

[74] Sachs Dep. at 144 [VX 139].

[75] *Id.*

[76] House Hearings, Water Resources Development Act of 1976, *supra* note 70, at 447 (Statement of Eugene Jensen) [VX 274].

River."[77] Although Virginia's proposed bill at that time still included provisions concerning the allocation of, and payment for, stored water in federally-financed reservoir projects, Jensen vowed to continue working with Maryland and to return to the Committee in the near future.[78]

In early September 1976, the agencies began discussing a separate agreement that would address Virginia's concerns about the allocation of water from, and the payment for water in, upstream reservoirs.[79] This ultimately resulted in a Memorandum of Understanding dated October 8, 1976, by which the parties agreed to undertake a "joint planning effort to assure an adequate water supply program for the Metropolitan Area."[80]

In the meantime, on September 5, 1976, Sachs and Bourassa wrote to the committee chairmen concerning H.R. 12215 and S. 3326, and informed them that Maryland and Virginia had reached agreement on the text of the legislation.[81] Senator Mathias and Congressman Beall, of Maryland, remarked at the time: "The fact that Maryland and Virginia have for literally

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[77] *Id.* at 447. Jensen's written statement to the Committee reiterated Virginia's rights to the Potomac River under the Compact of 1785 and the Black-Jenkins Award of 1877. *Id.* at 442.

[78] *Id.* at 447.

[79] *See* Handwritten Notes of Herbert M. Sachs dated 9/5/76 [Sachs Dep. Ex. 16] [VX 162]; Letter from Sachs to Jensen dated 9/15/76 [Sachs Dep. Ex. 20] [VX 166]; Virginia State Water Control Board, Memorandum for Agenda of Sep 27-28, 1976, at 9-10 [VA-SRC-2756, 2764] [VX 167]; Excerpt from the Proceedings of the Board at its Meeting on September 27-28, 1976 [VA-SRC-2405-07] [VX 168].

[80] Memorandum of Agreement between Maryland Water Resources Adm'n and Virginia State Water Control Board, dated 10/8/76, at 2 [Sachs Dep. Ex. 21] [VX 170].

[81] Letters from Sachs & Bourassa to Gravel and Roberts dated 9/7/1976 [VA-Gen-231-34] [Sachs Dep. Ex. 19] [VX 164].

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hundreds of years feuded over the use and control of the Potomac River makes the recent accord by the two states all the more significant."[82]

Virginia withdrew those portions of her proposed bill concerning payment for upstream reservoir storage.[83] The agreed-upon draft stated in section 3:

> [N]othing in this Act shall alter the riparian rights or other authority of the State of Maryland, or any political subdivision thereof [or] the Commonwealth of Virginia, or any political subdivision thereof . . . existing on the date of enactment of this Act relative to the appropriation of water from, or the use of, the Potomac River.[84]

In his deposition, Sachs testified about the purpose of this language:

> Q What was your understanding of the purpose of this section?
>
> A To move on with the enactment of the necessary federal legislation.
>
> Q But the purpose was to leave open the question of whether Maryland could apply its permitting authority to Virginia, or vice versa, or whether the Corps had such authority. It was to put off that question, right?
>
> A That's correct.[85]

With minor modification, the language of this Act became § 181 of the omnibus Water Resources Development Act of 1976, § 181, Pub. L. No. 94-587, 90 Stat. 2917, 2939-40 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a.[86]

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[82] Letter from Mathias *et al.* to Gravel dated 9/30/76 [MD-MDE-22225-26] [VX 169].

[83] Letters from Sachs & Bourassa to Gravel and Roberts dated 9/7/1976, at VA-Gen-234 [VX 164].

[84] *Id.*

[85] Sachs Dep. at 159 [VX 139].

Notwithstanding the passage of this Act in October 1976, the final version of the Low Flow Allocation Agreement, as required by the act, was not agreed to until January 1978.

5. The LFAA of 1978.

An initial draft of the LFAA was signed on December 6, 1976, by the WSSC, Maryland and Virginia, but not by the Army Corps of Engineers.[87] Under this version of the agreement, each state's share of Potomac River water during drought allocations would be based on the proportion of their respective pumpage of finished water to customers during the preceding winter (December through February).[88] Because the formula was not based on actual pumpage from the Potomac River in prior periods, it ensured that Virginia would receive an equitable allocation of Potomac River water notwithstanding that her municipalities had not yet commenced water withdrawals.

The Corps refused to execute the December 1976 version.[89] The Corps' chief concern was that "[w]ith projected future growth in the suburbs and a relatively stable projected

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[86] The section was added to the omnibus bill in September 1976. *See* Letter from Gravel to Bourassa dated 9/14/76 [MD-MDE-22229-32] [VX 165]; Letter from Mathias *et al.* to Gravel dated 9/30/76 [MD-MDE-22225-26] [VX 169]. The provision is mentioned briefly in the Senate Report accompanying S. 3823. Sen. Rep. No. 94-1255, *Water Resources Development Act* of 1976, 94th Cong., 2d Sess. 96-97 (Sept. 16, 1976) [VX 272]. There was no comparable provision at that time in the House version of the Water Resources Development Act. H.R. Rep. No. 94-1702, *Water Resources Development Act of 1976*, 94th Cong., 2d Sess. (Sept. 27, 1976). It was reported, without comment, as section 181 in the conference committee report. *See* H.R. Conf. Rep. No. 94-1755, *Water Resources Development Act of 1976*, 94th Cong., 2d Sess. 25-26 (Oct. 1, 1976) [VX 262].

[87] Draft, Potomac River Low Flow Allocation Agreement (Dec. 6, 1976) [VA-SRC-1133-47] [VX 171]; Press Release, State Water Control Board (Dec. 7, 1976) [MD-MDE-23457-58] [VX 173].

[88] Draft dated 12/6/76 at 8-9 [VX 171].

[89] Initially, the Corps contended that it could not execute the LFAA until it completed a report, referenced in § 181(a)(2)(B) of the Water Resources Development Act, 90 Stat. 2940, (continued...)

population in the District of Columbia, this formula would allow suburban utilities such as FCWA and WSSC . . . to establish a greater and greater legal claim on Potomac low flows. At the same time, a proportional decrease in the share available for WAD's service area (Washington, D.C., Arlington County, Falls Church, and portions of Fairfax County) would occur."[90]

On May 19, 1977, the Corps proposed a revised LFAA.[91] The Corps' new version altered the allocation formula during drought restrictions to provide that "only users of the subject portion of the Potomac River during the period of December 1, 1976 through February 28, 1977, shall be entitled to appropriate water from the subject portion of the Potomac River whenever the Restriction Stage or the Emergency State is in effect."[92] Users of the River after February 28, 1977 would be entitled to withdraw water during drought periods only when agreed to by the parties and "subject to the use of such additional sources of supply to the Potomac River as may be required."[93] The Corps explained: "a fixed allocation formula based on the

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which was not scheduled to be finished for "several years." Letter from Beall to Sachs dated 12/2/76, attaching letter from Veysay to Beall dated 11/30/76 [MD-MDE-20820-22] [VX 172]; Letter from Rowe to Sarbanes dated 4/5/77 [MD-MDE-21727-28] [VX 174]. However, Senators Mathias (Md.) and Sarbanes (Md.) introduced legislation on February 1, 1977, to delete this impediment. S. 608, 95th Cong., 1st Sess. (Feb. 1, 1977). During Senate hearings conducted in April 1977, the Corps agreed to that proposal and withdrew this objection as a basis for delaying the LFAA. *See* Hearings before the Subcomm. on Water Resources of the Sen. Comm. on Envir. & Public Works, 95th Cong., 1st Sess. 25, 127 (Apr. 25, 1977) [VX 261]. The amendment to § 181 was ultimately enacted as a rider on other legislation. Act of June 28, 1980, Pub. L. No. 96-292, § 2, 94 Stat. 609 (1980) [VX 291].

[90] Baltimore District, Corps of Engineers, Department of the Army, *Announcement of Public Meeting* 9 (8/8/77) [MD-MDE-21371-83] [VX 184].

[91] Letter from Withers to Bourassa dated 5/19/77 [Sachs Dep. Ex. 24] [VX 176].

[92] Draft dated 5/19/77 at 10 [VA-SRC-1355] [VX 176].

[93] *Id.*

present winter withdrawal rates has been proposed for use until new supplies are available during low flow periods. Without some fixed formula, the share of the water allocable to the District of Columbia will grow less and less during drought situations, as the demands of other communities expand."[94]

Because Virginia localities had not withdrawn water between December 1976 and February 1977, this proposal would freeze any share of water being allocated to Virginia in times of low flow. In May 1977, the Virginia State Water Control Board admonished the Corps for insisting on what became known as the "freeze provision," for delaying the execution of the LFAA, and for withholding federal permits for the FCWA to construct its shoreline intake.[95] On June 9, 1977, Bourassa wrote to the Corps setting forth Virginia's objections to its proposal.[96] Bourassa complained that the freeze provision would deny any water to Virginia during drought conditions and abrogate Virginia's riparian rights.[97]

On July 14, 1977, the Corps offered a minor compromise allocation formula that would retain the freeze, but that would allocate any future supply, augmenting the natural flow of the

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[94] Letter from Withers to Bourassa dated 5/19/77, at 1 [VA-SRC-1344] [VX 176] (emphasis added).

[95] Press Release, State Water Control Board (May 18, 1977) [MD-MDE-21667-71] [VX 175].

[96] Letter from Bourassa to Withers dated 6/9/77 [Sachs Dep. Ex. 22; MD-MDE-21639-41] [VX 177].

[97] *Id.* at 2.

River, to the user or users who paid for it.[98] Bourassa rejected that version of the freeze as well.[99]

In early August 1977, in an effort "to provide evidence in a written document that Virginia is aware of its rights and intends to protect them,"[100] Bourassa wrote to Sachs that the Virginia State Water Control Board was agreeable to Maryland's continued issuance of water appropriation permits to Virginia users, until Virginia enacted its own permitting system.[101] A Virginia assistant attorney general informed the State Water Control Board that the letter was an exercise of Virginia's sovereignty, "authorizing Maryland to operate a permit program on behalf of Virginia, in effect as its agent. The letter also serves notice that at some point Virginia may wish to operate its own permit system for the use of Potomac water in Virginia."[102]

Sachs responded by letter dated August 23, 1977.[103] "If you are indicating that Maryland would not be issuing permits to Virginia users of the mainstem Potomac, I think we have a legal issue at hand. I am under the impression that regardless of whether the Commonwealth issues or does not issue permits to Virginia users . . . Maryland's appropriation law would still be applicable."[104] Sachs testified at his recent deposition that he disagreed with Bourassa's

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[98] Letter from Withers to Bourassa dated 7/14/77 [MD-MDE-21634-38] [VX 179].

[99] Letter from Bourassa to Withers dated 7/26/77 [VA-SRC-1223] [VX 180].

[100] Memorandum from Fisher to Members, State Water Control Board, dated 8/4/77, at 3 [VA-SRC-1326-30] [VX 182].

[101] Letter from Bourassa to Sachs dated 8/5/77 [Sachs Dep. Ex. 26] [VX 183].

[102] Memorandum from Fisher to Members, State Water Control Board, dated 8/4/77, at 3 [VA-SRC-1326-30] [VX 182].

[103] Letter from Sachs to Bourassa dated 8/23/77 [Sachs Dep. Ex. 25] [VX 185].

[104] *Id.*

suggestion that Virginia users who obtained Virginia permits would not be required to obtain permits from Maryland: "Obviously, I didn't agree with him and that somewhere that had to be resolved by some legal authority."[105]

The Corps conducted a series of three public meetings about the proposed LFAA in September 1977. At one of those hearings, Thomas Schwarberg, the Director of the Northern Regional Office of the State Water Control Board, appeared and spoke on behalf of the Board.[106] He said that Virginia opposed the Corps' version of the LFAA and the freeze provisions, and accused the Corps of blackmail in delaying issuance of the FCWA's permit for a shoreline intake.[107] Schwarberg further stated:

> Virginia urges the Corps to stop playing their very dangerous delaying game using numerous excuses which vary from the need to complete studies and reports to the concern over having representation for many water users signing the Low-Flow Agreement, and instead, to sign the December 6, 1976, Low-Flow Allocation Agreement, in which the Corps played a lead role drafting.
>
> The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by Compact and expects those rights to be honored. Virginia has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions. It is felt that nothing in the December 6, 1976

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[105] Sachs Dep. at 186 [VX 139].

[106] T.M. Schwarberg, Statement of Virginia State Water Control Board presented at September 13, 1977, Public Hearing, Falls Church, Virginia, entitled *Virginia's Position on the Potomac River Low Flow Allocation Agreement* [VA-Gen-00235-37] [hereinafter "Schwarberg statement"] [VX 187]. A copy of this statement was contained in Maryland's files and produced by Maryland in discovery [MD-MDE-16420-22] [VX 187]; *see also* Department of the Army, Corps of Engineers, Baltimore District, *Public Meeting Record: Potomac River Low Flow Allocation Agreement* 72-79 (1978) [VX 258].

[107] Schwarberg Statement, *supra* note 106, at 1-2 [VX 187]; *Public Meeting Record: Potomac River Low Flow Allocation Agreement*, *supra* note 106, at 73 [VX 258].

> Agreement is deemed to in any way affect riparian rights to the Potomac River except as explicitly provided.[108]

On October 12, 1977, Virginia's State Water Control Board voted to file suit against the Corps if it did not execute the LFAA and issue a federal permit to the FCWA to construct its shoreline intake.[109] In November 1977, Virginia Governor Godwin wrote to the Secretary of the Army, Clifford Alexander, detailing Virginia's objections to the freeze provision stating, "[a]lthough we greatly desire a negotiated low flow agreement, Virginia could never accept an agreement that abrogates her riparian rights."[110]

Further discussions through December 15, 1977 led to agreement on a formula that gave all three jurisdictions a proportionate allocation of water during low-flow conditions.[111] The parties also agreed that, in calculating the amount of their equitable share, the Aqueduct would determine the minimum stream flow needed to preserve environmental conditions in the River.[112] Unless a new formula was negotiated and unanimously agreed to by January 1, 1988,

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[108] Schwarberg Statement, *supra* note 106, at 2-3 [VX 187]; *Public Meeting Record: Potomac River Low Flow Allocation Agreement*, *supra* note 106, at 73-74 [VX 258].

[109] Press Release, State Water Control Board (Oct. 12, 1977) [VA-SRC-1121] [VX 188]; Memorandum from Bourassa to SWCB dated 10/12/77 [VA-SRC-1148] [VX 189].

[110] Letter from Godwin to Alexander dated 11/16/77 [VA-SRC-1150-51] [VX 191]; *see also* Letter from Godwin to Alexander dated 11/7/77 [MD-MDE-16416-17] [VX 190].

[111] *See* Letter from McGinnis to Braun dated 11/29/77, enclosing Draft dated 11/29/77 [Sachs Dep. Ex. 29] [VX 192]; Letter from McGinnis to Coulter dated 12/9/77 [MD-MDE-21411] [VX 195]; Draft, Potomac River Low Flow Agreement, dated 12/9/77 [Sachs Dep. Ex. 31] [VX 196]; Transmittal from Bourassa to McGinnis *et al.* dated 12/14/77, attaching Memorandum from Bourassa to Godwin dated 12/14/77, Memorandum from Davis to Peck dated 12/14/77 [MD-MDE-20813-19] [VX 197]; Letter from Withers with Draft, Potomac River Low Flow Agreement, dated 12/15/77 [Sachs Dep. Ex. 34] [VX 198].

[112] Draft dated 11/29/77 at 9 ("In calculating the amount of water available for allocation, the Aqueduct will determine, in consultation with the parties and based upon then current conditions and information, any amount needed for flow in the Potomac River downstream from

(continued...)

or else determined through litigation, the percentage shares in place in 1988 would continue to govern the parties' respective allocations thereafter.[113] This provision served to protect the District's share from reduction after 1988, assuming that the population in the District of Columbia thereafter decreased, and that the population in the Maryland and Virginia suburbs thereafter increased.

The December 15, 1977 draft of the LFAA contained a new subsection 3(F), which provided as follows:

> This Agreement does not affect such rights as parties or others subject to this agreement may have to grant or obtain permits to appropriate additional amounts of water during periods other than the Restriction or Emergency stages, but except as specifically provided in Article 2, Section C and Article 3, Section E, any additional water use resulting therefrom shall not affect any user's allocated fair share during such stages.[114]

Sachs testified that the purpose of the first part of this provision was to leave open the question of which jurisdiction had the authority to issue water appropriation permits for withdrawals from the Potomac River.[115]

The December 15 draft had also provided in Article 3(C):

> Nothing herein shall restrict or limit such authority as the [Maryland Water Resources] Administration may properly have to issue permits or impose low flow allocation requirements upon any

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the Little Falls dam for the purpose of maintaining environmental conditions ('environmental flow-by') and shall balance such need against essential human industrial and domestic requirements for water.") [VX 192]; Draft dated 12/9/77 at 10 [VX 196].

[113] *See* Draft dated 11/29/77, at 10-12 [VX 192]; Draft dated 12/9/77, at 12-13 [VX 196]; Draft dated 12/15/77, at 12-15 [VX 198].

[114] Draft dated 12/15/77, at 19 [VX 198]. This language was not present in the Draft dated 11/29/77, at 14 [VX 192].

[115] Sachs Dep. at 222 [VX 139].

> other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River;. . . .[116]

On December 30, 1977, Virginia's Governor Godwin wrote to Maryland's Governor Lee, Army Secretary Alexander, and D.C. Mayor Washington with several additional requested revisions to the document.[117] Godwin proposed to add, in paragraph 3(C), "[a]fter the last semicolon: 'nor restrict or limit any such authority as the Commonwealth may have. . . .'"[118] He also proposed a separate provision specifically recognizing the possibility that Virginia might enact its own Potomac River permitting system.[119]

Governor Godwin's proposed change to Article 3(C), preserving Virginia's authority to issue permits, was specifically incorporated into the final document, dated January 11, 1978.[120] Maryland's Herbert Sachs testified, again, that the purpose of this amendment was "to protect any right that Virginia thought that it had with respect to regulating water use," including "issuing permits for withdrawals."[121] Although the final version did not include Godwin's other language recognizing that Virginia might enact its own permitting system, Article 3(E) was

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[116] Draft dated 12/15/77, at 18 [VX 198].

[117] Letter from Godwin to Lee, Alexander & Washington dated 12/30/77 [Sachs Dep. Ex. 30] [VX 200]. *See also* Letter from Bourassa to Godwin dated 12/28/77 [MD-MDE-21387-89] (advising Governor Godwin of need for his involvement) [VX 199].

[118] Letter from Godwin to Lee, Alexander & Washington dated 12/30/77, at VA-GEN-244 [VX 200].

[119] *Id.*

[120] Potomac River Low Flow Allocation Agreement, dated January 11, 1978, Art. 3(C), at 19 [Sachs Dep. Ex. 32] [hereinafter "LFAA"] [VX 201].

[121] Sachs Dep. at 218 [VX 139]; *see also id.* at 220 (stating "[a]gain, without belaboring what rights Virginia had, that, whatever they had, nothing in this would abridge those rights.").

altered so as to be neutral with respect to whether users would have to apply to Maryland, or to some other jurisdiction, for water appropriation permits.[122]

The Virginia State Water Control Board hailed the LFAA as a breakthrough, stating that the Board had "insist[ed] on Virginia's rights to use Potomac water when Northern Virginia communities face water shortages, as they did last summer."[123]

6. Virginia's Potomac River Riparian Rights Act of 1979.

On February 6, 1978, two state senators introduced in the Virginia General Assembly a bill entitled the "Potomac River Permit Act of 1978."[124] The bill would have created a surface water permitting system for withdrawals of water from the Potomac River basin, requiring permits for such withdrawals from the Virginia State Water Control Board.[125] The legislation

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[122] The following edits were incorporated into the final version of Article 3(E):

> 3(E) ~~Communities~~**Any community** or ~~entities~~**entity** which **seeks to** appropriate water from the ~~defined~~**subject** portion of the Potomac River~~, as permittees of the State~~, shall either become ~~parties~~**a member party** to this Agreement or ~~the State will cause the Administration to include~~**shall be governed by a permit which includes** the low flow allocation formula and such other ~~operating~~ provisions ~~of this Agreement in the permits~~ as **are** necessary to effect ~~its~~**the** purposes **of this Agreement**. Any **such** community or entity~~, not a party to this Agreement or subject to its provisions,~~ may apply ~~to the Government and the State~~ for permits ~~granting access~~**necessary** to **build water intake structures or to appropriate water, and such permits shall be processed in accordance with** the ~~withdrawal~~**rules and regulations** of ~~water~~**the permit-issuing agency**. . . .

Compare Draft dated 12/15/77, at 18-19 [VX 198] *with* LFAA, *supra* note 120, at 20 [VX 201].

[123] Press Release, State Water Control Board (Jan. 11, 1978) [VA-SRC-1442-43] [VX 201A].

[124] Virginia Sen. Bill No. 440 (offered 2/6/78) [VX 308].

[125] *Id.* § 62.1-44.115.

was continued to the 1979 session of the General Assembly, where it was amended "to delete the water-withdrawal-permit requirements and to simply reaffirm Virginia's riparian rights."[126]

The new legislation, entitled the "Potomac River Riparian Rights Act," passed both houses of the Virginia General Assembly and was enacted March 21, 1979. 1979 Va. Acts ch. 307. The Act provides:

> § 62.1-44.114. Use of Potomac River; riparian rights.
>
> The Commonwealth and its citizens shall have the right to such use of the Potomac River as may be necessary to the full enjoyment of their riparian ownership as provided at common law and in § 7.1-7 of the Compact of 1785 with Maryland, and confirmed by the Black-Jenkins Determination of 1877 and Article VII, § 1 of § 28.1-203, cited as the Potomac River Compact of 1958.
>
> § 62.1-44.115. Review of uses by Water Control Board; report.
>
> The State Water Control Board shall annually review the uses and development of the waters of the Potomac River, and make such report thereon as it deems advisable to the Governor and to the General Assembly, together with such recommendations as the Board feels are necessary for the protection and full enjoyment of Virginia's riparian rights in such river.
>
> § 62.1-44.116. Assistance by Board in riparian disputes.
>
> In the event non-Virginia claimants question or seek to abridge the riparian use of the waters of the Potomac River by Virginia riparian owners, the State Water Control Board shall advise and assist such riparian owners in the proper exercise and protection of their rights, giving due consideration to the rights of others and to the wise use of the water, and the Board shall assist in the resolution of conflicts concerning such rights.

Va. Code Ann. §§ 62.1-44.114 through 62.1-44.116 (Michie 1998).

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[126] Letter from Hill to Kidd dated 3/2/79, at 1 [VA-DEQW-478-79] [VX 205]; Committee Amendment in the Nature of a Substitute for Senate Bill No. 440 [VX 309].

At a Senate hearing on the water supply for the District of Columbia in October 1979, Thomas Schwarberg testified on behalf of the Commonwealth of Virginia as follows:

> Virginia's riparian rights to the reasonable use of the Potomac River have been partially addressed by the Low Flow Allocation Agreement, and are being further pursued through [Virginia] Senate Bill 440, which establishes the Potomac River Riparian Rights Act.[127]

In July 1981, the State Water Control Board submitted a report to Virginia Governor Dalton pursuant to § 62.1-44.115.[128] The report, authored by Bourassa, briefed the Governor on events in the area of water supply since the LFAA had been signed. Bourassa concluded his report by stating: "I believe that Virginia's Riparian Rights to the Potomac have always been and will be protected and this Low Flow Agreement is producing positive results, and will continue to do so."[129]

C. THE WATER SUPPLY COORDINATION AGREEMENT OF 1982 AND ANCILLARY COST SHARING AGREEMENTS.

The Interstate Commission on the Potomac River Basin ("ICPRB") was created in 1940 by an interstate compact entered into by Maryland, West Virginia, Virginia, Pennsylvania and the District of Columbia.[130] The ICPRB should not be confused with the proposed Potomac

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[127] District of Columbia Water Supply, *supra* note 23, at 193 (written testimony of Thomas M. Schwarberg) [VX 260]; *see also id.* at 189.

[128] Letter from Bourassa to Dalton dated 7/9/81 [VA-GEN-644] [VX 206].

[129] *Id.* at 4.

[130] 33 U.S.C. §§ 567b, 567b-1; Va. Code Ann. § 62.1-65 (Michie 2001); Md. Code Ann., Envir., § 5-303 (Michie 1996).

River Basin Commission that would have been created had the Potomac River Basin Compact of 1968 been adopted by all of the signatory states.[131]

The ICPRB performs analyses and studies relating to water quality, supply and demand in the Potomac River Basin. Article III of the ICPRB compact, added by a 1970 amendment, 33 U.S.C. § 567b-1, permits the formation of smaller sections composed of representatives from fewer than all of the signatory states. On November 1, 1979, the ICPRB created the Section of ICPRB for Cooperative Operations on the Potomac Relative to Water Supply (the "CO-OP").[132]

Beginning in the latter part of 1979, the FCWA, WSSC, WAD and CO-OP began to explore a regional approach to solving the Washington Metropolitan Area's water supply problems.[133] The two core elements of this solution were: 1) operating the existing water supplies of the Washington Metropolitan Area in a coordinated manner so as to maximize the use of off-Potomac resources during dry conditions; and 2) equitably sharing the costs of constructing, operating and maintaining Bloomington and any future reservoirs.[134]

These efforts bore fruit. On July 22, 1982, a Water Supply Coordination Agreement was entered into between the United States -- acting through the Corps and the Aqueduct -- the FCWA, the WSSC, the District of Columbia, and the CO-OP.[135] This agreement continues to

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[131] *See supra* Background, Part B(2).

[132] *See* Sachs Dep. at 31-32 [VX 139]; ICPRB Resolution dated 11/1/79, *reprinted in* District of Columbia Water Supply, *supra* note 23, at 389-93 [VX 260].

[133] *See generally* WMA Water Supply Study, *supra* note 4, at 29-34, 39 [VX 259]; *Ways, supra* note 12, at 134-35 [VX 282].

[134] Sachs Dep. at 228-29 [VX 139]; WMA Water Supply Study, *supra* note 4, at 29-30 [VX 259]; *Ways, supra* note 12, at 135 [VX 282].

[135] Water Supply Coordination Agreement (and Drought-Related Operations Manual) dated 7/22/82 [Sachs Dep. Ex. 36] [VX 207C].

govern water supply operations in the Washington Metropolitan Area. It provides, during reduced flow conditions, for the FCWA to use its Occoquan River reservoir to the fullest extent possible, and for the WSSC likewise to maximize its use of its Patuxent River reservoir.[136] Under the accompanying "Drought-Related Operations Manual," incorporated into the agreement, the CO-OP monitors stream flow and water demand among the three water suppliers. The CO-OP has the authority, in consultation with the suppliers and the Corps, to direct releases of water from the upstream reservoirs at Bloomington (now known as Jennings-Randolph)[137] and Little Seneca Lake, as well as to limit the withdrawal rates for the FCWA and the WSSC.[138] The CO-OP operates the system with the objective, among others, of minimizing the need to invoke allocation restrictions under the LFAA.[139]

In addition to providing for the coordinated use of available water supplies for the Washington Metropolitan Area, the Water Supply Coordination Agreement also addresses the need for developing future water supplies. Article 10 provides that, beginning in the year 1990 and every five years thereafter, WAD, FCWA, WSSC and the District of Columbia "shall review and evaluate the adequacy of the then available water supplies to meet the water demands in the Washington Metropolitan Area which may then be expected to occur during the succeeding

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[136] *Id.*, WSCA Art. 2.

[137] *See, e.g.*, Sachs Dep. at 61 [VX 139].

[138] Drought-Related Operations Manual, V(B) [VX 207C].

[139] The objective of the Drought-Operations Manual is to keep the probability of invoking the Restriction Stage of the LFAA at less than five percent, during a repeat of the historic drought of record, and to keep the probability of invoking the Emergency Stage at less than two percent. *Id.*, II(B), (C).

twenty year period."[140] If that review should determine that additional water supplies will be required to meet the expected demands twenty years forward, the parties agree to undertake negotiations to provide that additional water supply.[141] Article 10 specifies the formula for sharing the cost of constructing and maintaining such supplies among the District, the FCWA and the WSSC.[142] The formula is based on their relative increase in water demand following the period 1981-1985.[143]

The Water Supply Coordination Agreement creates an Operations Committee comprised of a representative from each of the three water suppliers.[144] The Operations Committee has the authority to review decisions by the Director of the CO-OP and, by unanimous agreement, to change those decisions.[145] The costs for the CO-OP to operate the coordinated system are shared 30% by the District of Columbia, 50% by the WSSC, and 20% by the FCWA.[146]

When the three water suppliers signed the Water Supply Coordination Agreement in July 1982, they simultaneously entered into a series of cost sharing agreements for the reservoirs at Bloomington (Jennings-Randolph), Little Seneca Lake and Savage River.[147] The WSSC, FCWA and the District of Columbia agreed to pay the Federal government for the costs of water supply

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[140] *Id.*, WSCA Art. 10 (emphasis added).

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* Art. 7.

[145] *Id.* Art. 7(a).

[146] *Id.* Art. 5a.

[147] Sachs Dep. at 224-35 [VX 139] & Sachs Dep. Ex. 36 [VX 207A-F].

storage in Jennings-Randolph,[148] and to assume from the Maryland Potomac Water Authority its previous contractual obligation to pay for such costs.[149] The parties also entered into cost-sharing agreements for the Little Seneca Lake[150] and Savage Reservoirs.[151]

These reservoirs now store 17.2 billion gallons for water supply purposes.[152] As of June 2001, the FCWA and its Northern Virginia customers had expended in excess of $9 million for their share of the capital, operating and maintenance costs of these three upstream reservoirs.[153]

The LFAA was amended in July 1982 as a result of the Water Supply Coordination Agreement.[154] The language in Article 2(C)(3)(a) that would have frozen the low flow

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[148] Agreement Between the United States of America and the District of Columbia, the Washington Suburban Sanitary Commission and the Fairfax County Water Authority for Future Water Supply Storage in the Bloomington Reservoir, dated 7/22/82 [Sachs Dep. Ex. 36] [VX 207D]; Bloomington Lake Payment Agreement dated 7/22/82 [Sachs Dep. Ex. 36] [VX 207E].

[149] Novation Agreement dated 7/22/82 [Sachs Dep. Ex. 36] [VX 207F]. The Maryland Potomac Water Authority ("MPWA") was created by the Maryland General Assembly in 1969 for the purpose of contracting with the federal government to pay the non-federal cost of water supply storage in the Bloomington Reservoir. *See* Sachs Dep. at 63-66 [VX 139]; Novation Agreement at VA-Gen-104 [VX 207F]; Maryland Code Ann., Envir., §§ 5-401 through 5-414 (Michie 1996). Under the Novation Agreement, the MPWA's rights and obligations were transferred to the FCWA, the WSSC and the District of Columbia, which undertook to pay the obligation of the MPWA to the Federal government. *See* Sachs Dep. at 63-66, 224-25 [VX 139].

[150] Little Seneca Lake Cost Sharing Agreement dated 7/1/82 [Sachs Dep. Ex. 36] [VX 207A].

[151] Savage Reservoir Cost Sharing Agreement dated 7/1/82 [Sachs Dep. Ex. 36] [VX 207B].

[152] Hagen & Steiner, *supra* note 7, at 2-2 through 2-3 [VX 264].

[153] Declaration of Charlie C. Crowder ¶ 8(b) (6/8/01) [VX 126]. The original declaration was included as Exhibit B to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness (filed 6/8/01).

[154] Modification No. 1, Potomac River Low Flow Allocation Agreement [Sachs Dep. Ex. 33] at VA-Gen-29-33 [VX 202].

allocations at 1988 levels was deleted.[155] This change was made effective "[d]uring such time as there is in effect a legally enforceable agreement by and among the Aqueduct, the District, the Authority and the Commission providing for the regional management of all their water supply facilities for the benefit of the Washington Metropolitan Area. . . ."[156]

The management system created by the Water Supply Coordination Agreement and the accompanying cost sharing agreements has proven to be a huge success. Before the present controversy arose, informed observers had described this "unprecedented regional cooperation in the development and use of water resources" as a "model of enlightened public participation and bureaucratic cooperation."[157] In light of these developments, the Army Corps of Engineers determined in 1983, in its comprehensive report on water supply for the Washington

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[155] *Id.*; *see generally Ways, supra* note 12, at 135-36 [VX 282].

[156] Modification No. 1 at VA-Gen-29 [VX 202].

[157] *Ways, supra* note 12, at 134, 136 [VX 282]. Maryland's Herbert Sachs likewise testified:

> Q And putting aside the issue of the Virginia and Maryland controversies at the state level, as between the governments, and focusing briefly on the interaction between the three major water suppliers, WSSC, Fairfax County Water Authority and WAD, how would you describe their cooperative efforts with respect to water supply?
>
> A I think it has been excellent. Having seen the Co-op Group in existence and how they function, how they have come to various agreements -- and, even more importantly, to go through the yearly exercises of drought preparedness and to have all of the various agreements in place as to how they would allocate the water, I think there has been, from everything I can see, complete cooperation amongst the utilities and the utilities with the regulators, as well as with the Interstate Commission. "

Sachs Dep. at 69 [VX 139].

Metropolitan Area, that no further action was required by the Corps to construct additional reservoirs.[158] The Corps stated:

> The Interstate Commission on the Potomac River Basin's CO-OP (Cooperative Water Supply Operations on the Potomac River) Program is the appropriate mechanism to promote and sustain the necessary level of regional cooperation endorsed in the recent series of agreements and contracts. The Water Supply Coordination Agreement formalizes the region's commitment to cooperative management from an overall perspective. Without such regional management, it is likely that the separate water supply systems would not be managed for the maximum benefit of all users throughout the MWA and shortages could result.[159]

In 1983, the LFAA Moderator appointed by the parties recommended that his compensation be reduced from a yearly retainer to a per-diem basis.[160] He wrote: "[i]nasmuch as there have been major steps taken by the parties to the Low Flow Allocation Agreement to minimize the likelihood of severe problems associated with low flows in the near future and to maximize cooperation to this end, I believe that the task of the moderator has been modified somewhat in reality from that which prevailed at the time of my initial appointment."[161] In 1986, the parties agreed to modify the LFAA to make the imposition of restrictions discretionary, given the addition of upstream reservoirs and the system of cooperation that had been implemented.[162]

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[158] WMA Water Supply Study, *supra* note 4, at 68, 71 [VX 259].

[159] *Id.* at 69.

[160] Letter from Wolman to Brown dated 3/30/83 [MD-MDE-23083] [VX 208].

[161] *Id.* His proposal was accepted and incorporated in Ancillary Agreement No. 2 [Sachs Dep. Ex. 33] at VA-GEN-41-43 [VX 202].

[162] *See* Letter from Brown to Hughes dated 2/19/86 [MD-MDE-23144] [VX 210]; Modification No. 2 at VA-Gen-37-38 [VX 202].

To date, it has been unnecessary to invoke either the Restriction Stage or Emergency Stage of the LFAA. The summer drought of 1999 marked the first year that the CO-OP directed the release of stored water from the upstream reservoirs to augment the natural flow of the Potomac River.[163] The CO-OP and the water suppliers succeeded in coordinating their respective withdrawals and providing for appropriate releases from upstream reservoirs to meet all of their unrestricted demands.[164]

The most recent twenty-year demand forecast prepared by the CO-OP pursuant to the Water Supply Coordination Agreement was completed in October 2000. It concluded that the "current system of resources is adequate to meet the *most likely* and *high growth* estimates of 2020 demands even if the worst drought of record was to be repeated."[165]

Nonetheless, the FCWA, WSSC and WAD have begun exploring the possible development of an additional reservoir at Stony River, on the North Branch of the Potomac River in West Virginia, to satisfy needs beyond the year 2020.[166] The FCWA is presently taking the lead for the water suppliers on that project.[167]

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[163] Hagen & Steiner, *supra* note 7, at 1-3 [VX 264]; for a detailed discussion of the CO-OP's activities during the 1999 drought, *see* ICPRB Report No. 99-6, *Washington Area 1999 Drought Operations* (October 1999) [VX 263].

[164] ICPRB Report No. 99-6, *supra* note 163, at 1, 11 [VX 263].

[165] Hagen & Steiner, *supra* note 7, at ES-4, 7-2 (emphasis in original) [VX 264].

[166] Sachs Dep. at 235-36 [VX 139]; Pajerowski Dep. at 161-65 [VX 140].

[167] Pajerowski Dep. at 163-64 [VX 140].

D. THE FAIRFAX COUNTY WATER AUTHORITY'S OFFSHORE INTAKE PROJECT.

The controversy between Virginia and Maryland over the FCWA's proposed offshore intake project was the precipitating event that caused this action to be filed. Several aspects of the controversy are relevant to analyzing Maryland's claims concerning its "police power" authority and its affirmative defense of prescription and acquiescence.

1. Background.

The facts set forth in this section concerning the purpose and need for the project were adjudicated by the Maryland Administrative Law Judge in an extremely detailed, 89-page opinion.[168] These findings were affirmed by the Final Decision Maker for the Maryland Department of Environment ("MDE"),[169] and found to be supported by substantial evidence by the Circuit Court for the City of Baltimore.[170] Accordingly, the following judicially-reviewed findings of fact are entitled to preclusive effect against Maryland in this proceeding.[171]

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[168] Letter from Friedman to Raphael *et al.*, enclosing Maryland Office of Administrative Hearings, Proposed Decision, *Fairfax County Water Authority v. Maryland Department of Environment*, OAH No. 98-MDE-WMA-116-044 (May 10, 2000) (Friedman, J.) [hereinafter "ALJ Ruling"] [VX 248].

[169] Maryland Department of Environment, Final Decision at 23, *Fairfax County Water Authority v. Maryland Department of Environment*, OAH No. 98-MDE-WMA-116-044 (Nov. 6, 2000) [VX 253].

[170] Memorandum Opinion at 16-20, *Petition of Maryland Department of Environment for Judicial Review of the Decision of a Final Decision Maker for the Maryland Department of Environment* (Balt. City Cir. Ct., Apr. 10, 2001) [VX 257].

[171] 28 U.S.C § 1738; *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) ("[W]e hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.") (*quoting United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)); *Leeds Fed. Sav. & Loan Ass'n v. Metcalf*, 332 Md. 107, 115 n.4, 630 A.2d 245, 249 n.4 (1993) (recognizing doctrine of non-mutual collateral estoppel); *Batson v. Shiflett*, 325 Md. 684, (continued...)

After the FCWA's shoreline intake on the Potomac River became operational in 1982, it was periodically plagued with operational difficulties. During local rainstorms, runoff from two upstream tributaries caused sediment plumes along the shoreline.[172] This resulted in significant "solids removal" expenses.[173] It also increased the health risk to the public in Virginia because of the association between turbidity, on the one hand, and the presence of waterborne pathogens[174] and disinfection by-product precursors,[175] on the other, and because of the danger of human error by treatment plant operators in having to frequently adjust the level of coagulant and other chemicals to handle the fluctuating raw water quality.[176] The shoreline intake was also subject to partial and total shutdowns due to clogging by grass, leaves and ice.[177] In addition, it was vulnerable to shutdowns resulting from accidental spills of manmade contaminants.[178]

702, 602 A.2d 1191, 1200 (1992) (holding that collateral estoppel is applicable to agency decisions).

[172] ALJ Ruling, *supra* note 168, at 19-20, 46 [VX 248].

[173] *Id.* at 25, 55-56 (finding that the expense of solids removal was $400,000 to $600,000 per year and that moving to an offshore intake would reduce solids loading by 50%).

[174] *Id.* at 25-34, 57-71.

[175] *Id.* at 25, 57.

[176] *Id.* at 53-54.

[177] *Id.* at 34-36, 71-74.

[178] *Id.* at 38-40, 76-78.

The problem with shoreline water quality was not confined to the Virginia side of the Potomac River. The Maryland ALJ found that the problem was the same or worse on the Maryland side.[179]

In the early 1990s, the FCWA hired an engineering firm to study the operational problems plaguing the intake. In 1994, after analyzing a variety of alternatives, the firm recommended the construction of a new intake extending into the channel of the River.[180] An offshore intake would avoid the significant fluctuation in raw water quality during local rainstorms,[181] would reduce solids loading by 50%,[182] and would be less vulnerable to blockages and shutdowns due to grass, leaves, ice and the occasional spill of manmade contaminants.[183]

2. Opposition by Maryland's Elected Officials.

On January 4, 1996, the FCWA submitted a joint federal/state application for the required permits for the project. Federal permits were required under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344.[184] Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), further required that the FCWA, as a condition of obtaining its federal permits, also obtain a water quality certification from

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[179] *Id.* at 81 ("All of the available water quality information reflects that the raw water quality along the Maryland shore at the site of the WSSC's intake is as poor, if not poorer than, the water quality at the Authority's shore intake.").

[180] *Id.* at 36-37, 75.

[181] *Id.* at 24, 53-55.

[182] *Id.* at 25, 55-56.

[183] *Id.* at 36, 39, 74-75, 77-78.

[184] Bill of Comp. ¶ 26; Answer ¶ 26 (admitted).

Maryland that the construction would not result in a discharge that would violate Maryland water quality standards (the "Section 401 Water Quality Certification").[185]

In response to that application, Maryland advised the FCWA that it needed three Maryland authorizations: a waterway construction permit, an amendment to the FCWA's water appropriation permit to take water from a different location than the shore, and a Section 401 Water Quality Certification under the Clean Water Act.[186] The FCWA's water appropriation permit amendment was granted by the Water Management Administration of MDE in April 1996, authorizing withdrawal of water from the proposed offshore location.[187] The two other Maryland authorizations remained outstanding.

On January 31, 1997, the Norfolk District of the U.S. Army Corps of Engineers, after seeking public comment, determined that the project qualified for federal authorization under an abbreviated standard permit for activities of "minimal impacts to the environment."[188] The abbreviated standard permit stated that the permit "would not be valid until the permittee obtained a State water quality certification under Section 401 of the Clean Water Act (CWA) and further, that the Corps' permit did not relieve the permittee from its obligation to obtain all other required State and local approvals."[189] This is a standard special condition in federal permits.[190]

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[185] *Id.*

[186] Bill of Comp. ¶ 27; Answer ¶ 26 (admitted); *see also* Letter from MDE to K. Smedley dated 1/16/96 [FCWA/MDE Joint Ex. 69] [VX 211].

[187] Bill of Comp. ¶ 28; Answer ¶ 28 (admitted); Letter from Filar to Smedley dated 4/10/96, attaching Water Appropriation and Use Permit [FCWA/MDE Joint Ex. 76] [VX 212].

[188] U.S. Army Corps of Engineers, Memorandum for the Record by Col. Carrol dated 2/1/01 at VA-Gen-775 [VX 232].

[189] *Id.*

By March 1997, the FCWA's application to Maryland for the remaining Section 401 Water Quality Certification and the Maryland waterway construction permit had been pending for 14 months. No comments had been received by MDE in response to a public notice. After the FCWA submitted information requested by MDE concerning proposed construction methods, an MDE representative advised on March 11, 1997, that its submittals appeared to be in order and that he hoped to issue the permit that week.[191] On April 1, 1997, the FCWA was told that the permit was "nearly complete."[192]

On April 22, 1997, however, MDE advised the FCWA that there recently had been public comment on the project, including an inquiry from Maryland Delegate Jean Cryor, and from a citizen activist in Maryland named John Mathwin.[193] In response, MDE scheduled a public hearing for May 21, 1997.[194] On May 1, 1997, MDE staff advised the FCWA that Mr. Mathwin had been calling numerous agencies "to stir up opposition" and that his "main issue is that Virginia has made the water dirty and is moving [the] intake to [the] middle of the river for cleaner water due to this."[195] MDE reassured the FCWA that "MDE is only reviewing the construction of the project, not whether it should be constructed," but cautioned that MDE did "not expect the Hearing to be pleasant."[196]

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[190] *See* 33 C.F.R. Part 325, App. A, Special Condition 2(a) (2001).

[191] Declaration of Katherine D. Smedley ¶ 6 & Ex. A [VX 133].

[192] *Id.* ¶ 7 & Ex. B [VX 133].

[193] *Id.* ¶ 8 & Ex. C [VX 133].

[194] *Id.*

[195] *Id.* ¶ 9 & Ex. D [VX 133].

[196] *Id.*

MDE began to receive numerous letters and telephone calls from various Maryland elected officials who were opposed to the project. Among the elected representatives in the Maryland General Assembly who advised MDE that they opposed the project were Delegate Cryor, Delegate Adrienne Mandel, Delegate Carol Petzold, Delegate Henry Heller, Senator Brian Frosh, Senator Jean Roesser, Delegate Mark Shriver, and Senator Christopher Van Hollen.[197]

On May 8, 1997, Delegate Heller wrote to Jane Nishida, Maryland's Secretary of Environment, inquiring "why the state of Maryland would be establishing a less restrictive building environment on the Virginia side of the river for competition against Maryland builders in Montgomery and Frederick Counties."[198] On May 19, 1997, Delegate Cryor wrote Secretary Nishida, thanking her staff for agreeing to hold a public hearing, and stating:

> It has become clear to me that Virginia's planners regard the Potomac River as key to their burgeoning development. . . As Virginia continues to develop and build in the northern part of the Commonwealth, we in Maryland, I believe, will continue to experience tremendous pressure, both for jobs and for changing our own protective environmental stand.
>
> It appears time for Maryland to look at the Potomac River and its place in the growing regional economy. Do we want to continue to exploit the river for the sake of Virginia's development?[199]

Cryor wrote a similar letter to Maryland Governor Parris N. Glendening and asked to meet with him.[200] Delegate Mandel likewise urged Secretary Nishida to reject the permit application,

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[197] Defendant's Answer to RFA Nos. 2-3 [VX 141].

[198] Defendant's Answer to RFA No. 4 & Ex. 1.

[199] Defendant's Answer to RFA No. 5 & Ex. 2 [VX 141].

[200] Letter from Cryor to Glendening dated 5/19/97 [MD-LEG-1953] [VX 213].

concerned that "a larger intake might result in Virginia drawing more water from the river in the future," and that Virginia's need for the project "may be directly related" to its "disregard for sound environmental management policies."[201]

On May 19, 1997, MDE advised the FCWA that the project had become very controversial, that a large turnout at the public hearing was expected, and that the Audubon Naturalist Society had also become very active.[202] The MDE representative stated that his office had "spent all day preparing a briefing for the Governor's office."[203] He said that most of the concern about the Project was based on the amount of water to be withdrawn, and not on the methods or manner of construction.[204]

At the public hearing on May 21, 1997, Delegate Cryor testified that she was opposed to the project and stated "I'm certainly going to work to not have this happen."[205] Maryland State Senator Roesser stated: "I think we should call a spade a spade" and "this expanded intake accommodates Virginia's massive growth."[206] Delegate Carol Petzold chimed in that she, too, opposed the project.[207] By contrast, a representative from the WSSC appeared at the hearing and stated: "Maryland does have very stringent regulations, however, despite those regulations, we

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[201] Defendant's Answer to RFA No. 6 & Ex. 3 [VX 141].

[202] Smedley Decl. ¶ 10 & Ex. E [VX 133].

[203] *Id.* Maryland has withheld from production in this case all deliberative memoranda prepared by MDE for Governor Glendening's office.

[204] Smedley Decl. ¶ 10 & Ex. E [VX 133].

[205] Defendant's Answer to RFA No. 8(a) [VX 141].

[206] *Id.* 8(b).

[207] *Id.* 8(c).

are experiencing essentially the identical problems that Fairfax is experiencing on the Virginia side, on the Maryland side."[208] Roland Steiner, of the ICPRB CO-OP, mentioned the cooperative efforts of the FCWA, the WSSC and the Washington Aqueduct, and stated that the water supply in the Potomac River and upstream reservoirs was sufficient to support anticipated future withdrawals.[209]

On May 22, 1997, Delegate Cryor wrote another letter to Secretary Nishida, again urging that the permit be denied:

> As you know, I am very concerned about the use of the Potomac River by Fairfax and other Virginia counties because of their economic development and explosive growth. Virginia's future economic growth impacts directly on Maryland. The stresses on the Maryland economy are in many ways directly caused by Virginia's vigorous growth.[210]

The opposition to the project by Delegate Cryor and other elected Maryland officials was widely reported in *The Washington Post*.[211]

By letter dated June 25, 1997, MDE asked the FCWA to consider withdrawing its permit application.[212] MDE also issued a press release announcing that it was declining to take action on the application at that time.[213] It was extremely unusual for MDE to request an applicant to

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[208] ALJ Ruling, *supra* note 168, at 82 [VX 248]; Smedley Decl. ¶ 11 [VX 133].

[209] Smedley Decl. ¶ 11 [VX 133].

[210] Defendant's Answer to RFA No. 9 & Ex. 5 [VX 141].

[211] Paul Valentine, "Water Pipe Plan for Fairfax Stirs Concerns in Md.," *The Washington Post* (May 22, 1997) [FCWA/MDE Joint Ex. 120] [VX 214].

[212] Letter from Hearn to Crowder dated 6/25/97, at 2 [FCWA/MDE Joint Ex. 134] [VX 217].

[213] MDE Press Release dated 6/26/97 [FCWA/MDE Joint Ex. 135] [VX 218].

withdraw a permit application.[214] Delegate Cryor warmly praised MDE for declining to issue the permit.[215] She cautioned J.L. Hearn, the director of the Water Management Administration: "I am sure that we have not heard the end of the need for additional river water to meet Virginia's economic growth. I know that you share my concern that this growth, which puts much pressure on Maryland's environment, is met with careful responses."[216]

The FCWA declined to withdraw its permit application and offered to work with MDE to address whatever concerns it had.[217] Most of MDE's stated concerns involved the maximum future capacity of the intake and treatment plant, and the growth projections for the service area.[218] FCWA submitted additional materials to MDE on August 29, 1997.[219] As to questions concerning water supply, the ICPRB CO-OP had submitted a letter referencing the Water Supply Coordination Agreement of 1982, explaining that the FCWA was a regional participant in providing up-stream water supply reservoirs and stating that the most recent demand forecast concluded that "current resources can meet increases in demand expected to occur during the next several decades, even under very dry conditions."[220] In addition, the WSSC and WAD both

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[214] Pajerowski Dep. at 76 ("Q. Have you ever heard in your experience at MDE of any other instance that the administration asked an applicant to withdraw a waterway construction permit application? A. No, I don't.") [VX 140].

[215] Defendant's Answer to RFA No. 14 and Ex. 7 [VX 141].

[216] *Id.* Ex. 7 (Letter from Cryor to Hearn dated June 30, 1997) [VX 141].

[217] Letter from Crowder to Hearn dated 8/12/97 [FCWA/MDE Joint Ex. 156] [VX 219].

[218] *Id.*

[219] Letter from Crowder to Hearn dated 8/29/97 [FCWA/MDE Joint Ex. 160] (attachments omitted) [VX 221].

[220] Letter from Steiner to Clark dated 6/10/97 [FCWA/MDE Joint Ex. 125] [VX 216].

submitted letters supporting the FCWA's offshore intake project and stating that the offshore intake would not affect their ability to provide water to their respective service areas.[221] The Virginia Commissioner of Health submitted a letter to MDE, stating: "[w]e, at the Virginia Department of Health, consider the move to a mid-river water intake to be an essential public health initiative for the more than one million Virginians and their visitors who use Fairfax County Water Authority drinking water on a daily basis."[222]

On October 21, 1997, before the Water Management Administration had announced its final decision on the FCWA permit application, a letter to the editor appeared in *The Fairfax Journal*, which stated:

> Fairfax County residents don't know it, but Maryland has just cut your water off.
>
> Five Montgomery County representatives to the Maryland General Assembly (state senators Brian Frosh, Jean Roesser and PJ. Hogan, and delegates Jean Cryor and Ray Beck) prevailed upon the Maryland Water Management Administration to reject the Fairfax County Water Authority request for construction of a mid-Potomac River water intake, within Maryland boundaries.[223]

On December 10, 1997, MDE's Water Management Administration denied the FCWA's application for a waterway construction permit.[224] The accompanying Notice of Decision stated

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[221] Letter from White to Clark dated 6/17/97 [FCWA/MDE Joint Ex. 131] [VX 220]; Letter from Jacobus to Clark dated 8/21/97 [FCWA/MDE Joint Ex. 158] [VX 220A].

[222] Facsimile transmittal from Taylor to Clark dated 10/30/97, attaching Letter from Gordon to Crowder dated 10/29/97 [FCWA/MDE Joint Ex. 168] [VX 223]; Defendant's Answer to RFA No. 17 & Ex. 10 [VX 141]; *see also* Answer ¶ 25 (last sentence).

[223] John C. "Rufus" Webb, "Maryland Water Belongs There," *The Fairfax Journal* (Oct. 21, 1997) [FCWA/MDE Joint Ex. 167] [VX 222]; Answer ¶ 33 (first sentence).

[224] Letter from Hearn to Crowder dated 12/10/97, enclosing Notice of Decision and Summary of Basis for Decision [FCWA/MDE Joint Ex. 175] [VX 224].

that "the basic project purpose of obtaining a safe and adequate supply of drinking water may reasonably be accomplished using the existing intake on the Virginia shore of the Potomac River."[225] The FCWA was further advised that "the project was not evaluated for a water quality certificate under the federal 401 requirements for consistency with State water quality standards."[226]

This was the first time that Maryland had ever denied a waterway construction permit to any applicant for work in the Potomac River.[227] MDE notified the Corps of its actions.[228] In response, the Corps suspended the FCWA's federal permit, subject to reinstatement in the future should Maryland's authorization subsequently be obtained.[229]

Maryland State Senator Roesser wrote Secretary Nishida that she "applaud[ed]" MDE's decision,[230] and Delegate Cryor likewise congratulated the Secretary for her agency's "brilliant work" in denying the permit.[231] Maryland's Governor Glendening wrote Mr. Mathwin, thanking him for his concern about the offshore intake. Governor Glendening stated: "Based on the

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[225] *Id.*, Notice of Decision, at 1 [VX 224].

[226] *Id.*, Summary of Basis for Decision, at 2 [VX 224].

[227] Answer ¶ 34.

[228] Letter from Hearn to Williams dated 12/10/97 [FCWA/MDE Joint Ex. 176] [VX 225].

[229] Letter from Reardon to Sultan dated 2/5/1998 [FCWA/MDE Joint Ex. 185] [VX 227].

[230] Letter from Roesser to Nishida dated 12/12/97 [FCWA/MDE Joint Ex. 177] [VX 226].

[231] Defendant's Answer to RFA No. 23 & Ex. 11 [VX 141].

evidence provided, *I* decided that the public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake."[232]

On December 23, 1997, the FCWA appealed the Water Management Administration's decision to MDE through an administrative "contested case" process mandated by Maryland law.[233] This process took nearly three additional years, until November 6, 2000, to result in a final decision by MDE.[234] In each of those three intervening years, Maryland state legislators introduced legislation in the Maryland General Assembly to restrict the FCWA's project.

3. Legislative Efforts Targeting the FCWA Offshore Intake.

The chief opponents of the FCWA's offshore intake project in the Maryland legislature from 1998 through 2000 were Delegate Jean Cryor and Senator Christopher Van Hollen. Delegate Cryor introduced bills for three years in a row to block the project. She ran for re-election successfully in November 1998, claiming she had "stopped Fairfax County" from building the offshore intake project.[235] A press release issued by her office on February 19, 2000, blasted the FCWA's project as "the modern day equivalent of strip mining," and boasted that "[t]his is the third year, Delegate Cryor, of Potomac, has presented a bill to stop a water intake pipe from being built in the middle of the Potomac River."[236]

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[232] Defendant's Answer to RFA No. 27 & Ex. 13 (Letter from Glendening to Mathwin dated 2/9/98) (emphasis added) [VX 141].

[233] COMAR 26.01.07 [VX 326].

[234] Final Decision, *supra* note 169 [VX 253].

[235] Defendant's Answers to RFA Nos. 24-25 & Ex. 12 [VX 141].

[236] Jean Cryor, Press Release dated 2/19/2000, at 2 [MD-LEG-02344-45] [VX 230].

(a) The 1998 Maryland General Assembly.

In the 1998 General Assembly, Delegate Cryor introduced H.B. 848, entitled "Potomac River - Water Removal."[237] This bill would have prohibited the Maryland Department of Environment from issuing a permit for any intake or other device that would remove water "from off shore of the Potomac River."[238] Delegate Cryor's aide asked MDE to lobby for the bill and expressed the hope that passage of the bill would assist MDE in denying a permit to the FCWA.[239] MDE subsequently supported the bill with a proposed amendment that would allow MDE to issue a permit for an offshore water intake only if the applicant could prove there were no other practical alternatives and that using the existing intake would jeopardize public health.[240] MDE's position statement cautioned that "[t]he bill, however, may affect the riparian rights of landowners along the Potomac River. Virginia and West Virginia have full riparian rights to the use of the Potomac River. This was formally established in the Compact of 1785 and upheld by the U.S. Supreme Court."[241]

The Maryland Chamber of Commerce, the Potomac Electric Power Company (which provides electrical service in Maryland) and Allegheny Power (a Maryland utility) testified before the Maryland House Committee on Environmental Matters that they were opposed to

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[237] Md. House Bill No. 848, Defendant's Answer to RFA No. 33 & Ex. 14 [VX 141].

[238] *Id.*

[239] Defendant's Answer to RFA Nos. 34-35 & Ex. 15 (Memorandum from Snyder to Bauer *et al.* dated 1/29/98) [VX 141].

[240] Position Statement, Maryland Department of Environment (2/24/98) [Pajerowski Dep. Ex. 7] [VX 228].

[241] *Id.* at 2 [VX 228].

H.B. 848.[242] On March 9, 1998, that committee submitted an unfavorable report on the bill.[243] On March 11, 1998, Delegate Cryor told *The Washington Post* that she would file the bill the following year, reiterating that it was needed to keep the FCWA from building its proposed offshore intake in the Potomac River.[244] On March 18 and 19, 1998, Delegate Cryor thanked the leadership of MDE for their assistance on the bill.[245] She vowed that "[w]e will try again next year to protect our river from Virginia."[246] Not coincidentally, the bill the following year would be called the "Potomac River Protection Act."

(b) The 1999 Maryland General Assembly.

On January 26, 1999, in anticipation of the Maryland legislative efforts, counsel for the FCWA wrote to the Maryland Attorney General to correct some of the misperceptions about the offshore intake project and to warn that efforts to restrict Virginia's access to the Potomac River violated Virginia's interstate compact rights and might cause Virginia to file suit in the Supreme Court.[247] On February 5, 1999, Maryland Senator Van Hollen introduced S.B. 582, entitled

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[242] Defendant's Answer to RFA No. 36 [VX 141].

[243] *Id.*, No. 37.

[244] *Id.*, No. 38.

[245] *Id.*, Nos. 39-40 & Exs. 16, 17.

[246] *Id.*, Ex. 17.

[247] Letter from Powell to Curran dated 1/26/99 [MD-MDE-10407-08] [VX 229].

"Potomac River Protection Act."[248] A few days later, Delegate Cryor introduced the companion bill, H.B. 615, in the House of Delegates.[249]

The bills would have required MDE to perform a study of water supply and demand in the non-tidal portion of the Potomac River basin through the year 2030 and to submit a final report to the General Assembly by June 1, 2001.[250] During that study period, and for six months after the study was submitted to the legislature (*i.e.*, January 1, 2002), no waterway construction permit could be issued for an intake in the Potomac River unless the intake met certain conditions.[251] One of those conditions -- that "the pipe does not have the capacity to withdraw from the Potomac River an amount of water that exceeds the amount of water the person is authorized to withdraw under the water appropriation permit by more than 5 MGD [million gallons per day]"[252] -- would have significantly restricted the FCWA's project. The FCWA's proposed offshore intake was sized at 312 MGD to match the ultimate build-out capacity of its water treatment plant (300 MGD).[253] The FCWA's existing water appropriation permit specified a maximum daily capacity of 200 MGD.[254] Thus, this provision would have prevented the

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[248] Defendant's Answers to RFA Nos. 41-42 & Ex. 18 ("Potomac River Protection Act") [VX 141].

[249] Defendant's Answers to RFA Nos. 44-45 & Ex. 19 ("Potomac River Protection Act") [VX 141].

[250] *Id.*, Potomac River Protection Act, §§ 5-12A-03(A), 5-12A-03(D)(4)(I).

[251] *Id.* § 5-12A-04(B).

[252] *Id.* § 5-12A-04(B)(3).

[253] ALJ Ruling, *supra* note 168, at 43, 85 [VX 248].

[254] Water Appropriation Permit at 1 [VX 212].

issuance of a permit for an intake larger than 205 MGD -- at least until the permit moratorium expired on January 1, 2002.[255]

Although slightly different versions of the bill were passed without dissent in the Maryland House and Senate, and a conference committee resolved the minor differences in the two versions, neither bill could be finally enacted before the 1999 session of the General Assembly expired at midnight on April 11, 1999.[256]

(c) The 2000 Maryland General Assembly.

Senator Van Hollen and Delegate Cryor reintroduced the "Potomac River Protection Act" in the 2000 session of the Maryland General Assembly. Their bills, S.B. 729 (introduced 2/4/99) and H.B. 395 (introduced 2/3/99), were revised from the previous year.[257] Instead of calling on MDE to perform a new study on the Potomac River, the legislation (as amended) simply directed MDE to submit to the General Assembly the results of three pending studies. One of those studies, ironically, was the Year 2000 20-year demand forecast being prepared by the CO-OP for

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[255] *See also* Pajerowski Dep. at 216 [VX 140]: "Q. You understood that the Authority was applying for a water construction permit to allow an intake with the capacity of 300 mgd. A. Yes, I did. Q. So is it correct that if Senate Bill 582 had been passed it would have required that the Authority's offshore intake be limited to 205 mgd? A. Yes, that's my understanding, at least during the interim period until the studies referenced in Section B of that part of the Bill would have been completed."

[256] Pajerowksi Dep. at 214 [VX 140]; Defendant's Answer to RFA Nos. 43, 46, 47 [VX 141].

[257] Defendant's Answer to RFA Nos. 50-53 & Exs. 22 (final version of H.B. 395, as amended), 23 (final version of S.B. 729, as amended). The legislative history for these bills is available at the Maryland General Assembly's legislative website. *See* Bill File, H.B. 395 (2000 Session), at http://mlis.state.md.us/2000rs/billfile/hb0395.htm (last modified 12/19/2000) [VX 327]; Bill File, S.B. 729 (2000 Session), at http://mlis.state.md.us/2000rs/billfile/sb0729.htm (last modified 12/19/2000) [VX 328].

the FCWA, the WSSC and WAD.[258] As originally drafted, the bills imposed no deadline for the submission of those studies (H.B. 395 did not even specify which studies were to be submitted), and would thereby have continued the permit moratorium for a potentially indefinite time. On February 18, 2000, Senator Van Hollen was accurately quoted in *The Washington Post* as stating: "We see it as a quantity issue. . . . Maryland did not want to create the situation where Virginia would be able to drain the Potomac to fuel out-of-control development."[259]

Virginia filed this action on February 18, 2000. Virginia's Bill of Complaint specifically referenced the introduction of these bills as evidence of Maryland's hostility to Virginia's Potomac River access rights.[260]

On February 22, 2000, the Maryland Senate Economic and Environmental Affairs Committee conducted a public hearing on S.B. 729, and Senator Van Hollen testified as the bill's sponsor. A witness to the hearing gave the following account of Senator Van Hollen's testimony:

> The sponsor of S.B. 729, Senator Christopher Van Hollen, stated at the hearing that his legislation, like the bill he proposed the previous year, was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. Senator Van Hollen said that his bill would permit Virginia to have an offshore intake in the Potomac River, but that it would limit the intake capacity to 205 million gallons per day ("MGD"), rather than the 300 MGD capacity sought in the permit application. He stated that the purpose of this limitation was to make sure "they are not fueling more development on the Virginia side of the river, which has been out of control." He stated that a further purpose of his bill was that, since Virginia had sued Maryland in the Supreme Court to declare

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[258] *Id.*, Potomac River Protection Act (as amended) § 1(a)(1).

[259] Defendant's Answer to RFA No. 55 [VX 141].

[260] Bill of Comp. ¶ 41 & App. U, V.

> that Virginia had the right to withdraw water from the Potomac River without Maryland's consent, the limitation on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval.[261]

Senator Van Hollen's statements about Virginia's supposed "out of control growth" were also reported the next day in *The Washington Post*.[262]

Also on February 22, 2000, J.L. Hearn -- the senior MDE official who had originally denied the FCWA's permit -- informed the FCWA's General Manager that, even if a version of the Potomac River Protection Act were passed that allowed the permit to issue, he believed that MDE would not issue the permit because of the positions that had been taken against the project by Governor Glendening and Secretary Nishida.[263]

S.B. 729 received a favorable report from the Senate Committee and, when it was introduced to the full Senate on March 16, 2000, the floor sponsor explained: "what it addresses is the question relating to the County of Fairfax and Virginia's application for a new intake pipe."[264] Amendments were subsequently added on March 17 and 21 "to provide an exception (in section 1(c)) that would allow three affected Maryland entities (PEPCO, Allegheny Power,

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[261] Declaration of Mark Kronenthal ¶ 3 (4/27/2000) [VX 130]. The original declaration was lodged with the Court on May 2, 2000, when Virginia filed its Reply Brief in support of its motion for leave to file the bill of complaint. The Declaration was attached as Appendix Y to the Reply Brief.

[262] Defendant's Answer to RFA No. 56 [VX 141].

[263] Declaration of Charlie C. Crowder, Jr. ¶ 3 (4/27/2000) [VX 125]. The original declaration was lodged with the Court on May 2, 2000, when Virginia filed its Reply Brief in support of its motion for leave to file the bill of complaint. The Declaration was attached as Appendix Z to the Reply Brief.

[264] Kronenthal Decl. ¶ 5 [VX 130].

and Westvaco) to be exempted from the Bill's prohibition on the construction of water intakes in the Potomac River."[265] The Senate approved S.B. 729 on March 23, 2000.[266]

On March 25, 2000, Delegate Cryor's companion bill, H.B. 395, was amended to conform to the Senate version.[267] At that point, both versions contained the same provision from the previous year's bill, requiring that any permit granted for a replacement intake during the study moratorium specifically limit the capacity of the pipe to an amount that did not exceed by 5 MGD the amount of water that could be withdrawn under the existing water appropriation permit. On March 26, the House adopted H.B. 395 by a vote of 139-0.[268] On April 3, 2000, the Senate passed H.B. 395 by a vote of 45-0.[269]

At this point, Senator Van Hollen sought to amend his version of the bill and, on April 7, 2000, the House of Delegates endorsed that amendment.[270] The amendment permitted MDE to issue a permit for a replacement intake during the study moratorium if the Secretary found it to be "in the public interest," provided that the new "pipe will not have the capacity to withdraw a greater quantity of water than the quantity of water that can be withdrawn by *the existing intake*," and that the "new pipe will incorporate a physical component, that cannot be modified without the consent of the Department of the Environment, that will limit the capacity of the pipe for

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[265] *Id.* ¶ 6.

[266] *See* Bill File, S.B. 729 (2000 Session), *supra* note 257 [VX 328].

[267] *See* Bill File, H.B. 395 (2000 Session), *supra* note 257, Amendment No. 490312/01 (3/25/00) [VX 327].

[268] *Id.*

[269] *Id.*

[270] Bill File, S.B. 729, *supra* note 257, Amendment No. 430219/01 (4/7/2000) [VX 328].

maximum daily withdrawal to the maximum amount authorized by the appropriation permit . . . ."[271] As applied to the FCWA, this amendment would allow a permit to issue for the 312 MGD offshore intake sought by the FCWA (because it would be smaller than the capacity of the FCWA's existing intake (400 MGD)), but the pipeline would have to have physical restriction on flow capacity that could not be removed without MDE's consent.[272] The Senate followed suit and adopted the amendment as well.[273]

Senator Van Hollen explained the purpose of his amendment in interviews with newspaper reporters. *The Washington Post* reported: "The primary purpose of the amendment, he said, is to strengthen the hand of Maryland environmental officials in negotiations with Virginia. The original bill would have prevented the state from granting Virginia's permit and settling the lawsuit before it reaches the U.S. Supreme Court. 'I don't think Maryland wants to roll the dice on control over the Potomac River,' Van Hollen said, referring to a possible court fight."[274] As to the requirement for a physical component restricting the capacity of the new intake, the *Post* later quoted Van Hollen as saying: "'We don't want Virginia to willy-nilly withdraw large amounts out of the Potomac to fuel development on its side of the river,' said Sen. Christopher Van Hollen Jr. (D-Montgomery), one of the law's authors. 'We'd have the key to physically adjust it.'"[275]

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[271] *Id.* (emphasis added).

[272] *See* Final Decision, *supra* note 169, at 20 [VX 253]; Pajerowski Dep. at 223-25 [VX 140].

[273] Bill File, S.B. 729, *supra* note 257 [VX 328].

[274] Defendant's Answer to RFA No. 59 [VX 141].

[275] Defendant's Answer to RFA No. 71 [VX 141].

In a letter to Governor Glendening dated April 18, 2000, Senator Van Hollen similarly explained the background and purpose of his amendment as follows:

> As you know, MDE denied the FCWA's permit request and the dispute is now the subject of an administrative law proceeding. In addition, the State of Virginia has filed suit in the Supreme Court of the United States contesting Maryland's control over the Potomac River.
>
> This year, as the General Assembly considered the Potomac River bills, Delegate Cryor and I met with Secretary Jane Nishida to discuss the best strategy to pursue given the current legal situation. At that time, I suggested that we amend the Senate bill to allow the Secretary greater flexibility to negotiate a settlement of the legal proceedings on favorable terms should the opportunity arise. Secretary Nishida supported this approach and the Department testified in favor of the amendment. Secretary Nishida informed me that she would recommend that you sign that version of the legislation. Delegate Cryor also agreed that if the Senate bill, as amended, passed she would support that strategy.
>
> . . .This is a complex issue that has been further complicated by Virginia's action in the Supreme Court. We must ensure that we do not embark on a course of action that jeopardizes Maryland's control of the Potomac River.[276]

On May 18, 2000, *The Washington Post* reported that: "Maryland Gov. Parris N. Glendening said yesterday he will veto a bill that would have blocked efforts by Virginia water authorities to extend an intake pipe into the center of the Potomac River until environmental studies are complete--a process that could take years. Instead, Glendening (D) plans to sign a competing measure today that would allow Virginia to build the pipe upon approval by the

[276] Defendant's Answer to RFA Nos. 60 & Ex. 24 [VX 141].

Maryland Department of the Environment."[277] Governor Glendening, in fact, vetoed H.B. 395, and signed S.B. 729 on May 18, 2000.[278]

4. The Maryland Administrative Proceeding.

While these legislative efforts targeted at the offshore intake were proceeding, Maryland's administrative process was slowly processing the FCWA's appeal of the decision of the Water Management Administration of MDE. During the administrative case, Maryland stipulated that the FCWA's offshore intake would not adversely impact any boating interests.[279] It stipulated that the intake would not adversely affect Potomac River fisheries.[280] It also stipulated that Maryland's right to issue a Section 401 Water Quality Certification, pursuant to the federal Clean Water Act, had been waived by operation of law, because no decision had been rendered in more than a year from the date of the application.[281]

Although the FCWA repeatedly argued that these concessions entitled it to construct the offshore intake as a matter of law, under the Compact of 1785 and the Black-Jenkins Award, the ALJ and the Final Decision Maker declined to reach the FCWA's compact argument at any time during the proceedings.[282] As a result of not deciding that issue, the administrative process involved inquiries extending well beyond whether the project would interfere with navigation.

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[277] Defendant's Answer to RFA No. 62 [VX 141].

[278] Defendant's Answer to RFA No. 63 [VX 141]; 2000 Md. Laws ch. 557.

[279] ALJ Ruling, *supra* note 168, at 15 [VX 248].

[280] *Id.* at 15-16.

[281] Stipulation of Parties Concerning § 401 Water Quality Certification (Nov. 12, 1998) [VX 239]; *see also infra* text accompanying notes 532-34.

[282] *E.g.*, Memorandum and Order on Prehearing Motions, at 3 (Nov. 24, 1998) (reserving ruling on the compact issue "until the decision on the merits of this case.") [VX 240]; ALJ

(continued...)

On November 24, 1998, the ALJ issued a pre-hearing ruling that MDE could not base its denial of a waterway construction permit on a finding that the project was not "needed," or that the FCWA already had a shore intake that provided a sufficient amount of raw water.[283] While such considerations might be proper for a water appropriation permit, she stated, they were not proper for a construction permit.[284] Accordingly, the ALJ barred MDE from introducing any evidence to show that the FCWA did not "need" to build the intake.[285]

The contested case hearing commenced on December 3, 1998. At the close of MDE's two days of evidence, the FCWA filed a motion for summary disposition, arguing that MDE had failed to prove that the project would result in any environmental harm, and that the FCWA's interstate compact rights entitled it to build the project. The ALJ granted that motion on January 21, 1999.[286] Without reaching the FCWA's compact claims, the ALJ expressed skepticism that MDE had, in fact, considered any environmental impacts from the project when it first denied the permit.[287] Nonetheless, the ALJ went on to address the alleged environmental impacts that MDE raised for the first time at the contested case hearing, which she referred to as "MDE's

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Ruling, *supra* note 168, at 88 ("MDE has failed to meet its burden of proof that the construction permit should be denied. Therefore, it is unnecessary for me to address the issue of whether the terms of the Compact of 1785, or any other agreement, compel MDE to allow the construction. . . .") [VX 248]; Final Decision, *supra* note 169, at 21 n.6 ("I also find it unnecessary to address the Authority's argument that that [sic] the Compact of 1785 compels the Department to allow construction of the intake. . . .") [VX 253].

[283] Memorandum and Order on Prehearing Motions, *supra* note 282, at 3-9 [VX 240].

[284] *Id.* at 8-9.

[285] *Id.* at 9.

[286] Memorandum and Order on Motion (Jan. 21, 1999) (Friedman, J.) [VX 242].

[287] *Id.* at 5.

newly articulated basis for denying the permit. . . ."[288] After reviewing MDE's evidence, she found that MDE had failed to show that the project would result in any adverse environmental impact.[289] She declined to address the FCWA's interstate compact claims.

MDE appealed. On June 7, 1999, the Final Decision Maker for MDE overruled the ALJ's finding that the Department could not consider whether a project was "needed" in deciding whether to issue a waterway construction permit.[290] He remanded the case back to the ALJ to complete the contested case hearing on the question of "the need for the proposed water intake construction."[291] The Final Decision Maker declined at that time to review the ALJ's findings that MDE had presented no evidence to show that the project would result in any adverse environmental impact.[292] He did not address the FCWA's interstate compact argument.

The contested case hearing resumed in November 1999 to consider the "need" for the project and consumed six separate hearing days.[293] Numerous documentary exhibits were received into evidence,[294] and numerous expert witnesses were called by both parties.[295]

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[288] *Id.* at 6 (emphasis added).

[289] *Id.* at 7-10.

[290] Opinion of the Final Decision Maker, at 12-17 (June 7, 1999) (Penner) [VX 243].

[291] *Id.* at 20.

[292] *Id.* at 19-20.

[293] ALJ Ruling, *supra* note 168, at 1-2 [VX 248].

[294] *Id.* at 3-14 (listing exhibits).

[295] *Id.* at 14.

On November 30, 1999, Virginia Attorney General Mark Earley wrote to Maryland Attorney General Joseph Curran, protesting the protracted administrative proceedings in general, and Maryland's demand that Virginia prove the "need" for the project, in particular:

> Maryland officials have demanded that Virginia now demonstrate to the satisfaction of your State the necessity of the pipe. This is not acceptable. Nothing in the Compact of 1958 permits the State of Maryland to sit in judgment on the necessity of improvements undertaken by Virginia and its citizens. As I am sure you will understand, the Commonwealth cannot acquiesce in such an infringement on the riparian rights exercised by Virginians for more than 200 years -- just as Maryland could not do so if the facts were reversed.[296]

General Earley called on Maryland to resolve the controversy by the end of the year, either by issuing a fully effective permit, or by formally acknowledging that the FCWA "needs no permit from Maryland before proceeding with the construction of this improvement."[297]

General Curran responded on January 4, 2000.[298] He asserted that Virginia's compact rights were inapplicable above tidewater and that the Maryland administrative process had to run its course.[299] Following the receipt of this letter, and the introduction, for the third time, of legislation in the Maryland General Assembly targeting the offshore intake project, Virginia instituted this action on February 18, 2000.

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[296] Defendant's Answer to RFA No. 48 & Ex. 20 (Letter from Earley to Curran dated 11/30/99 at 2) [VX 141].

[297] *Id.*

[298] Defendant's Answer to RFA No. 49 & Ex. 21 (Letter from Curran to Earley dated 1/4/2000) [VX 141].

[299] *Id.*

On May 10, 2000, the ALJ issued an 89-page ruling finding that MDE had failed to demonstrate any proper basis for withholding the waterway construction permit.[300] She ruled, for a second time, that MDE had failed to prove that the permit should be denied.[301] She again found it unnecessary to consider the FCWA's compact arguments.[302]

On November 6, 2000, the Final Decision Maker for MDE affirmed the ALJ's decision in all relevant respects.[303] He too found it unnecessary to consider the FCWA's compact arguments.[304]

Between the date of the ALJ ruling and MDE's Final Decision, Maryland enacted the Potomac River Protection Act, discussed above. The Final Decision Maker concluded that the FCWA's project qualified for permitting under the exception added by Senator Van Hollen's

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[300] She summarized her lengthy opinion in a single paragraph: "I have considered the testimony and evidence presented, and conclude that Fairfax established its need to construct the mid-river intake to resolve serious operational problems that threaten public health. The credible and reliable evidence at the hearing was that the construction of the proposed intake promotes the public welfare and is in the best public interest because it will provide the best raw water source for drinking water, reduce sediment loading, reduce the risk of waterborne pathogens and disinfection byproducts in the finished water, reduce clogging problems at the shore, and improve the reliability of the Corbalis Plant's water treatment operations. MDE presented virtually no credible evidence to the contrary, and it bore the burden of proof in this case to show that the mid-river intake was unnecessary." ALJ Ruling, *supra* note 168, at 45 [VX 248].

[301] *Id.* at 84, 88.

[302] *Id.* at 88.

[303] Final Decision, *supra* note 169 [VX 253]. He too concluded: "The record establishes that the proposed intake is likely to provide better quality raw water, which will reduce the need for treatment to remove solids and thereby reduce the risk of human error in the treatment process. The record further indicates that with minimum adverse impacts to the river, the proposed intake will lower the risk from waterborne pathogens, disinfection byproducts, oil spills and other contaminants, reduce blockages of the intake from ice, leaves and grass and reduce the Authority's treatment costs." *Id.* at 17-18.

[304] *Id.* at 21 n.6.

amendment.[305] The new law required the pipe, however, to have "a physical limiting device attached which limits intake to the daily maximum volume to [sic] 200 MGD, the quantity authorized by its appropriation permit."[306] He directed that a permit be issued accordingly.[307]

On November 7, 2000, Governor Glendening's office issued a press release maintaining that "Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe."[308] The press release stated that the Governor remained concerned that the offshore intake project would cause "irreparable environmental damage" in the form of urban "sprawl."[309] The claim that urban "sprawl" would result from the project had not been urged by MDE in the contested case proceeding itself. The press release also stated that the Governor had directed the Attorney General "to aggressively pursue every option to ensure the Potomac River is protected. . . ."[310]

On December 5, 2000, MDE attempted to appeal from the ruling of its own Final Decision Maker to the Circuit Court for the City of Baltimore.[311] MDE also moved to stay the Final Decision and to block construction of the project pending the appeal. By December 2000, this original action proceeding was well under way and Virginia had submitted its motion for

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[305] *Id.* at 19-20.

[306] *Id.* at 20.

[307] *Id.* at 21-23.

[308] Defendant's Answer to RFA No. 69 [VX 141].

[309] Defendant's Answer to RFA No. 70 [VX 141].

[310] *Id.*

[311] Maryland Department of Environment, Petition for Judicial Review (Dec. 5, 2000) [VX 254].

partial summary judgment to the Special Master. Accordingly, on December 18, 2000, the FCWA notified the Baltimore City Circuit Court about the pendency of this original action and expressly reserved the disposition of its federal and interstate compact claims for determination here, pursuant to *England v. Louisiana State Bd. of Med. Exm'rs*, 375 U.S. 411, 419-21 (1964).[312]

MDE's motion to stay construction of the FCWA's project was denied by the Baltimore City Circuit Court, Judge Cannon presiding, on January 16, 2001. The court found that substantial evidence supported the Final Decision Maker's ruling that the project would result in no adverse environmental impact.[313] After full hearing and briefing, Judge Cannon subsequently dismissed MDE's appeal on April 10, 2001.[314] The court found that MDE lacked standing to appeal its own decision. Judge Cannon wrote that MDE was trying to "play fast and loose" by appointing a final decision maker to render a decision and then by challenging that decision when it went in favor of the FCWA.[315] This amounted to a "heads I win, tails you lose" approach under which "there was no way the Authority could win."[316] Judge Cannon went on to

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[312] Fairfax County Water Authority, Response to Petition for Judicial Review (Dec. 18, 2000) [VX 255].

[313] Memorandum Opinion Denying Request for Stay, *Petition of Maryland Department of Environment for Judicial Review of the Decision of a Final Decision Maker for the Maryland Department of Environment* (Balt. City Cir. Ct., Jan. 16, 2001) (Cannon, J.) [VX 256].

[314] Memorandum Opinion, *Petition of Maryland Department of Environment for Judicial Review of the Decision of a Final Decision Maker for the Maryland Department of Environment* (Balt. City Cir. Ct., Apr. 10, 2001) [VX 257].

[315] *Id.* at 8.

[316] *Id.* at 8-9.

conclude, as an independent basis for the decision, that substantial evidence supported the Final Decision Maker's findings.[317]

Maryland declined further appeals in the state case. Instead, Maryland filed a motion to dismiss this original action proceeding as moot. The Special Master recommended in Memorandum of Decision No. 3 that Maryland's motion to dismiss be denied.

ARGUMENT

I.

MARYLAND'S "POLICE POWER" DOES NOT AUTHORIZE IT TO IMPOSE LIMITATIONS ON VIRGINIA'S POTOMAC RIVER ACCESS RIGHTS.

Maryland contends that its inherent "police power" authority allows it to regulate the manner in which Virginia exercises her Potomac River access rights, and that nothing in the compacts limits or constrains that authority. This argument is wrong on numerous grounds, any one of which would be sufficient to defeat it.

A. The Interstate Compacts Deny Maryland the Authority to Regulate Virginia's Potomac River Access Rights.

Maryland's police power argument fails on the most fundamental level: it violates this Court's well-established jurisprudence governing interstate compact cases. "A compact is a contract. It represents a bargained-for exchange between its signatories and 'remains a legal document that must be construed and applied in accordance with its terms.'" *Kansas v. Colorado*, 121 S. Ct. 2023, 2034 (2001) (O'Connor, J., concurring in part and dissenting in part) (*quoting Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). "As both a contract and a statute, [an] interstate Compact is interpreted by using customary rules of contract interpretation and

[317] *Id.* at 16-21.

statutory construction." Mem. Dec. No. 4, at 13 & n.18. "Just as if a court were addressing a federal statute, then, the '*first and last order of business*' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (*quoting Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983)) (emphasis added).

Applying these basic principles here compels the conclusion that the compacts in question do not give Maryland the authority to regulate Virginia's Potomac River access rights. The plain language of Article VII of the Compact of 1785 gives equally to Marylanders and Virginians "full property in the shores of Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river. . . ."[318] Clause IV of the Black-Jenkins Award states that "Virginia is entitled not only to the full dominion over the soil to low-water mark on the south shore of the Potomac, but has a *right* to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership. . . ."[319]

These provisions say nothing about giving Maryland the right to regulate the terms or manner of Virginia's Potomac River access and are not susceptible of any such interpretation. Indeed, the Special Master has already found:

> In sum, contract interpretation and statutory construction rules permit no conclusion other than that Article VII of the Compact by its ***clear language*** grants Virginia ***the authority*** to 'make' and 'carry out' 'improvements' from the Potomac shore adjoining its

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[318] Compact of 1785, art. VII, 1785-86 Md. Laws ch. I, 1785-86 Va. Acts ch. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823) [VX 1].

[319] Black-Jenkins Award, 1878 Md. Laws ch. 274, 1878 Va. Acts ch. 246, Act of March 3, 1879, ch. 196, 20 Stat. 481, 482 (emphasis added) [VX 2].

> lands along the entire Potomac, provided that its improvements do not obstruct or injure the navigation of the River.

Mem. Dec. No. 4, at 24 (emphasis added); *see also id.* at 42 ("[T]he plain language of Article VII of the Compact of 1785 (as later preserved in the Potomac River Compact of 1958) unambiguously secures for Virginia *the right to make improvements* connected to the Virginia shore along the entire Potomac River so long as those improvements do not obstruct navigation.") (emphasis added); Tr. Hr'g, at 11 (10/23/01) ("I have ruled in favor of Virginia on the principal issue at -- in this matter; and that if we stopped right now, it would be an unlimited access of -- both to the access to and use of the Potomac riverbed and waters in the Potomac. And I -- I have read very carefully both the complaint and the answer and the counterclaim to the complaint; and the burden, it seems to me quite clearly, is on Maryland to establish limits to that access and use that I have ruled that Virginia has.").

When the State of Maryland and the Commonwealth of Virginia intended to create a permitting system governing their respective uses of the Potomac River, they did so expressly. Thus, Article IV of the Compact of 1785 provided that certain vessels engaged in trade between Virginia and Maryland "may enter and trade in any part of either State, ***with a permit*** from the naval-officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges."[320] No such permitting requirement was referenced in Article VII of that Compact, giving Virginians and Marylanders the "privilege" of erecting wharves and improvements in the Potomac River. Similarly, Article III, Section 4 of the Potomac River Compact of 1958 gave the newly created, bi-state Potomac River Fisheries Commission the power to issue licenses for the taking of finfish, crabs, oysters, clams or other shellfish from the

[320] Compact of 1785, art. IV, 1785-86 Md. Laws ch. I, 1785-86 Va. Acts ch. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823) (emphasis added) [VX 1].

waters within the jurisdiction of the Commission, and for boats, vessels and equipment used for such taking.[321] No permitting or licensing requirement is referenced in Article VII, Section 1, of the 1958 Compact, which provides that the "rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact. . . ."[322] As the Commissioners' report stated, this provision "carries forward certain rights of the citizens of Maryland and Virginia which have not been in controversy."[323]

The Black-Jenkins Award also compels the conclusion that Maryland does not have the power to regulate Virginia's Potomac River access rights. The arbitrators found that Virginia's long-established, historic use of the Potomac River, "from the earliest period of her history," and without Maryland challenge or interference, established Virginia's prescriptive right to the low-water mark and the use of the River beyond.[324] The arbitrators pointed out that Virginia did not surrender those rights in her Constitution of 1776, "*but on the contrary*, she *expressly reserved* 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and

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[321] Potomac River Compact of 1958, art. III, § 4, 1958 Md. Laws ch. 269, 1959 Va. Acts ch. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962) [VX 3].

[322] *Id.* Art. VII, § 1.

[323] Report of the Commissioners to the Governors of Maryland and Virginia, *The Potomac River Compact of 1958, reprinted in* Virginia House Document No. 22, at 6 (1960) [VX 105].

[324] Board of Arbitrators to Adjust the Boundary Line Between Maryland and Virginia, *Opinions and Award of Arbitrators on the Maryland and Virginia Boundary Line* 15-16 (M'Gill & Witherow 1877) [VX 64].

Pocomoke,) and *all improvements* which have or ***will be made*** thereon.'"[325] The arbitrators went on to state that "Maryland assented to this" through Article VII of the Compact of 1785.[326]

The arbitrators specifically rejected Maryland's argument that a title acquired by prescription should somehow limit the scope of Virginia's access rights:

> But how does prescriptive title to land affect the right of the parties in the adjacent waters?
>
> > It has been argued with great force and ingenuity that a title resulting merely from long possession can apply only to the ground which the claimant has had under his feet, together with its proper appurtenances; . . . that therefore title by prescription stops at the shore. But this is unsound, because the water in such a case is not claimed as appurtenant to the dry land, but as part of it. ***One who owns land to a river owns to the middle of the channel.*** Upon the same principle, if one State has the territory on both sides the whole river belongs to her. . . This construction applies with equal certainty to every kind of title, whether it be acquired by express concession, by lawful conquest, or by the long continuance of a possession which, at first, may have been but a naked trespass. ***In the last case the silent dereliction of the previous proprietor implies a grant of his whole right as fully as if it had been given by solemn treaty.***[327]

In the arbitrators' view, Virginia's rights in the River were equivalent to ownership by express grant, entitling Virginia to the use of the Potomac River "to the middle of the channel."[328]

Indeed, Maryland fully conceded during the arbitration that Virginia had the right to construct improvements from the shoreline in her own discretion. This was not an "offer of

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[325] *Id.* at 16 (emphasis added) (*quoting* 1776 Va. Const. Art. XXI, *reprinted in* 9 Hening's Statutes at Large c. II 112, 118 (1821)).

[326] *Id.*

[327] *Id.* at 25-26 (emphasis added, original emphasis altered).

[328] *Id.*

settlement," as Maryland suggests.[329] Rather, it was Maryland that claimed that the "true" boundary line should be drawn around "all wharves and other improvements now extending or ***which may hereafter be extended, by authority of Virginia*** from the Virginia shore into the said river beyond low water mark."[330] In describing this proposed boundary in their 1873 report to Maryland's Governor Whyte, the Maryland commissioners stated: "The line along the Potomac River is described in our first proposition according to ***our construction*** of the compact of 1785, and as we are informed is according to the general understanding of the citizens of both States residing upon or owning lands bordering on the shores of that river, and also ***in accordance with the actual claim and exercise of jurisdiction by the authorities of the two States hitherto.***"[331] Maryland never claimed, nor did the arbitrators decide, that the "authority of Virginia" had ever been, or could ever be, conditioned on prior approval by Maryland.

In short, if the drafters and ratifiers of the Compact of 1785 and the Black-Jenkins Award had intended to give Maryland the authority to regulate the terms of Virginia's Potomac River access -- something that would have unquestionably alarmed Virginia -- they would have said so explicitly. As the Master has previously put it (in rejecting Maryland's argument that the Compact of 1785 was limited to the tidal portion of the river), "[i]t is inconceivable that the

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[329] Md. Br. at 45.

[330] William P. Whyte & Isaac D. Jones, *Boundary Line Between the States of Maryland and Virginia, Before the Hons. Jeremiah S. Black, William A. Graham, and Charles J. Jenkins, Arbitrators upon the Boundary Line between the States of Virginia and Maryland* 1 (June 26, 1874) (emphasis added) [VX 121]; *See* W. Pinkney Whyte, *Synopsis of Argument made by Mr. Pinkney Whyte, of Counsel for Maryland, Boundary Line Between the States of Maryland & Virginia, Before the Board of Arbitrators* 36 (Aug. 26, 1876) (emphasis added) [VX 123].

[331] Commission (Maryland) on Boundary Lines Between Virginia and Maryland (1870-1874), *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia. Authorized by the act of 1872, chapter 210,* at 27 (Annapolis 1874) (Report of Dec. 30, 1873) (emphasis added) [VX 68].

drafters and enactors . . . would have left such important substantive matters unresolved. . . ." Mem. Dec. No. 4, at 19-20.

B. Maryland's "Contemporaneous" Evidence Does Not Show that the Parties to the Compact and the Black-Jenkins Award Gave Maryland the Right to Control Virginia's Access to the Potomac River.

In an effort to show that it has the power to regulate Virginia's access to the Potomac River, notwithstanding the plain language of the Compact and the Black-Jenkins Award, Maryland offers a smattering of "contemporaneous" evidence. Little of that evidence predates 1950.

1. Maryland's 1791 Act of Cession.

For early, "contemporaneous" evidence of the parties' construction of the Compact of 1785, Maryland relies primarily on its 1791 law granting the commissioners for the new federal district the authority to issue licenses for wharves in the waters of the Potomac River and the Eastern Branch (the Anacostia River) to be built adjoining the new federal city. Md. Br. at 41; 1791 Md. Laws ch. XLV § 12. Maryland argues that this shows that Maryland, rather than Virginia, believed it had authority to regulate the construction of structures extending into the Potomac River.

Maryland's argument is based on an incomplete account of the formation of the District of Columbia.[332] In December 1788, Maryland authorized that up to a ten mile square of its territory be ceded to the United States for the seat of the federal government.[333] On December 3,

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[332] For an excellent brief history on the formation of the District of Columbia, *see* 7 Dorothy Twohig, ed., *The Papers of George Washington (Presidential Series)* 161-68 (1998) (ed. note) [VX 279A].

[333] 1788 Md. Laws ch. XLVI, *reprinted in* 2 William Kilty, *The Laws of Maryland* (1800) [VX 329].

1789, Virginia authorized that up to ten square miles of its territory be ceded for that purpose.[334] In July 1790, Congress enacted the Residence Act.[335] The Act provided for the establishment of the permanent seat of the federal government in "a district of territory, not exceeding ten square miles, to be located as hereafter directed on the river Potomac. . . ."[336] The Act called for the President to appoint three commissioners who, "under the direction of the President," would define the limits of the territory.[337] The Act provided that it would not affect the "the operation of the laws of the state within such district . . . until Congress shall otherwise by law provide."[338]

Congress contemplated when it passed the Residence Act that the federal *city*, to be located within the federal district, would be on the Maryland side of the River. Thus, the Act gave the commissioners the power to "purchase or accept such quantity of land on the *eastern side of the said river, within the said district*, as the President shall deem proper for the use of the United States. . . ."[339] The commissioners were directed to provide suitable buildings for the Congress, the President and other public offices by December 1800.[340]

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[334] 1789 Va. Acts c. XXXII, *reprinted in* 13 Hening's Statutes at Large 43 (1823) [VX 27].

[335] Act of July 16, 1790, ch. 28, 1 Stat. 130 (1790).

[336] *Id.* § 1.

[337] *Id.* § 3.

[338] *Id.* § 1.

[339] *Id.* § 3 (emphasis added).

[340] *Id.*

In January 1791, President Washington appointed Pierre L'Enfant to prepare the plan for the federal city.[341] L'Enfant's instructions directed him to survey areas for the federal city on the *eastern* side of the Potomac River.[342] In March 1791, Washington met with the Maryland landowners whose property would be needed for the federal *city*, and they agreed to convey their property to the federal government on March 30, 1791.[343] Washington thereupon issued a proclamation declaring the boundaries of the ten mile square federal territory.[344] Approximately one fourth of the federal territory included land on the Virginia side of the Potomac River.

L'Enfant presented Washington with his first sketch of his plan for the federal city on June 22, 1791, followed by a more detailed plan on August 19, 1791.[345] L'Enfant's plan located the federal city entirely on the Maryland side of the River, within the federal territory. The portion of the federal district on the Virginia side was called "Part of Virginia, Within the Federal District."[346] In September 1791, the commissioners wrote L'Enfant that "[w] have agreed that the federal district shall be called 'The Territory of Columbia,' and the federal city

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[341] 7 Twohig, *The Papers of George Washington*, *supra* note 332, at 496 n.1 (ed. note) [VX 279A].

[342] *Id.* at 495, 496 (Letter from Washington to Deakins & Stoddert dated 3/2/1791); *id.* at 496-97 n.1 (ed. note) [VX 279A].

[343] 8 Dorothy Twohig, ed., *The Papers of George Washington (Presidential Series)* 24 (1999) (Agreement of the Proprietors of the Federal District dated 3/30/1791) [VX 279B].

[344] *Id.* at 27 (Proclamation dated 3/30/1791) [VX 279B].

[345] *Id.* at 287 (Letter from L'Enfant to Washington dated 6/22/1791), 439 (Letter from L'Enfant to Washington dated 8/19/1791) [VX 279B].

[346] *See Morris v. United States*, 174 U.S. at 217-18 (maps showing Plan of the City). A digital image of L'Enfant's 1791 plan may be viewed at the Library of Congress website at http://hdl.loc.gov/loc.gmd/g3850.ct000091 (last visited Jan. 14, 2002).

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'The City of Washington.' The title of the map will therefore be 'A Map of the City of Washington in the Territory of Columbia.'"[347]

The portion of Fairfax County ceded to the federal government by Virginia (including the town of Alexandria), but which was not part of the plan of the City of Washington, was later designated by Congress as the "county of Alexandria."[348] In accordance with the Residence Act of 1790, that territory continued to operate under the laws of Virginia until the federal government moved to the district in 1800. For example, the Virginia General Assembly in 1798 declared that the jurisdiction of the Mayor of the town Alexandria "shall extend to all vessels lying at any wharf, projecting from said town; and also to all vessels made fast to others lying at the wharves, or in the docks, or waters within the wharves."[349] After Congress assumed jurisdiction over the territory of Columbia, it specified in 1801 that the laws of Virginia would "continue" to apply in that part of the District of Columbia that was ceded by the Commonwealth.[350] Congress ultimately retroceded the "county of Alexandria" back to Virginia in 1846, reciting that "experience hath shown that the portion of the District of Columbia ceded to the

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[347] *Morris*, 174 U.S. at 257 (quoting letter from the Commissioners to L'Enfant dated 9/9/1791); *see also* 8 Twohig, *The Papers of George Washington*, *supra* note 343, at 506, 510 (Letter from Jefferson to Washington dated 9/8/1791, advising that the Commissioners had decided to name the federal city the "City of Washington" and the federal territory the "territory of Columbia") [VX 279B].

[348] *See* Act of Feb. 27, 1801, ch. 15, § 2, 2 Stat. 103, 105 (1801) (dividing the district of Columbia into the "county of Washington," on "the east side of the river Potomac," and the "county of Alexandria," on the west side of the River) [VX 282B].

[349] 1798 Va. Acts. ch. LX, 2 Va. Stat. 122, 123 [VX 315].

[350] Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103 (1801) [VX 282B].

United States by the State of Virginia has not been, nor is ever likely to be, necessary for that purpose. . . ."[351]

This history plainly refutes Maryland's argument. The Maryland statute of December 17, 1791, simply authorized the Commissioners, until Congress assumed jurisdiction within the "territory" of the new federal district, to license the construction of wharves "*adjoining the said city*. . . ." 1791 Md. Laws ch. XLV § 12 (emphasis added). This law applied, by its express terms, only to wharves on the Maryland side of the River adjoining the "city."[352] It did not apply to anyone constructing a wharf from the opposite shore on the Virginia side. Accordingly, Maryland's citation of its 1791 law completely fails to show that Maryland had the authority to regulate the construction of improvements on the Virginia shore.

Maryland's reliance on its 1791 law actually backfires. It serves only to highlight the fact that Maryland did not seek to require permits for the construction of wharves or improvements from landowners along the Virginia shore, whether opposite the City of Washington, or anywhere else along the 267 miles of River that separated the two States at the time. Maryland did not seek to impose any such requirements on Virginia until the second half of the 20th Century, nearly two centuries after the Compact of 1785. That fact provides far stronger

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[351] Act of July 9, 1846, ch. 35, 9 Stat. 35 (1846) [VX 282C].

[352] 1791 Md. Laws ch. XLV § 12. Justice White cited the 1791 Maryland statute in his dissent in *Morris* to show that the landowners in the new City of Washington had not lost their riparian rights to construct wharves appurtenant to their properties along the shore, notwithstanding that that the creation of Water Street, which ran along the bank of the River, cut off their direct access to the Potomac. 74 U.S. at 307 (White, J., dissenting) ("Indeed, if all the riparian rights, as to the lots facing on the river, had been destroyed by the effect of the drawing of the L'Enfant plan, then the requested authority [from the Maryland General Assembly] was wholly unnecessary. . . ."). The majority held, to the contrary, that Water Street had been intended in the Plan of the City as early as L'Enfant's 1791 design, and that, because the street cut off the landowners' direct water access, they were "not entitled to riparian rights" at all. *Id.* at 270-71.

'contemporaneous' and 'practical' evidence that the parties to the Compact of 1785 did not intend for Maryland to have any permitting authority over construction along the Virginia shore of the River.[353]

2. Maryland's 1853 Act Consenting to the Washington Aqueduct.

For its next bit of "contemporaneous" evidence, Maryland relies on the history surrounding the creation of the Washington Aqueduct to argue that Maryland, and not Virginia, had jurisdiction over water withdrawals in 1853. Maryland contends that, while it gave its consent for the United States to withdraw water for the Aqueduct in 1853, Virginia's consent was limited simply to the acquisition of land for the construction of a dam across the Potomac to the Virginia side. Md. Br. at 43-44. That shows, Maryland implies, that the parties recognized that only Maryland had the authority to approve water withdrawals from the River.

Maryland's argument is misleading and historically flawed. Maryland fails to point out that, by 1852, the Army Corps of Engineers had already recommended that the intake for the water supply be on the *Maryland shore* of the River at Great Falls.[354] President Fillmore transmitted that recommendation to Congress on February 21, 1853.[355] Congress then

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[353] *See Bank of America Corp. v. United* States, 462 U.S. 122, 130-32 (1983) (interpretation adopted by agency 60 years after passage of statute was not contemporaneous or practical construction but rather suggested that earlier policy followed by agency for preceding 60 years was more faithful to the statutory intent); *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576 (1930) ("*Early* and long-continued usage amounting to a practical construction of the constitutional provision requires that it be so regarded.") (emphasis added).

[354] *Ways, supra* note 12, at 6 [VX 282]; Senate Exec. Doc. 48, 32d Cong., 2d Sess. 2, 33 (1853) [VX 271]. The location at Great Falls was necessary in order to supply sufficient water pressure by gravity flow to the Capitol. Senate Exec. Doc. 48 at 12.

[355] *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 646 (1884); Senate Exec. Doc. 48, *supra* note 354, at 1 [VX 271].

appropriated $100,000 on March 3, 1853 "for the purpose of bringing water into the city of Washington. . . ."[356] The Act provided that "if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained. . . ."[357] Maryland gave its assent on May 3, 1853.[358] President Pierce approved of the Maryland location for the intake in June 1853.[359]

As originally designed, the plan called for the creation of a feeder dam that would have extended all the way across the River to the Virginia shore.[360] Accordingly, when the Virginia General Assembly gave its consent to the project in March 1854, the consent was limited to "the purchase of land necessary for an abutment and quarries for the construction of a dam across the Potomac River."[361] Because the water withdrawal for the Aqueduct occurred entirely on the Maryland side, and because Maryland's consent for that was required by Congress, nothing in this history suggests that Maryland and Virginia somehow recognized that Maryland alone had

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[356] Act of March 3, 1853, ch. 97, 10 Stat. 189, 206 (1853) [VX 283].

[357] *Id.*

[358] 1853 Md. Laws ch. 179 [VX 317]; *United States v. Great Falls Mfg. Co.*, 112 U.S. at 647.

[359] *Ways, supra* note 12, at 11 [VX 282].

[360] *Id.* at 17. Largely as a result of litigation with the Great Falls Manufacturing Company and the valuation of its property rights, the United States decided in 1864 to construct the dam only as far as Conn's Island. *United States v. Great Falls Manufacturing Co.*, 112 U.S. at 650-52. Congress finally authorized the extension of the dam from Conn's Island to the Virginia shore in 1882. *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 584-85 (1888); Act of July 15, 1882, ch. 294, 20 Stat. 168 (1882) [VX 285].

[361] 1854 Va. Acts ch. 5 [VX 294].

the authority to regulate water withdrawals by Virginia. Only by ignoring that history could Maryland suggest otherwise.[362]

Maryland's statement that its 1853 approval of the Aqueduct "even today, serves as the basis for the federal government's water rights in the non-tidal Potomac" (Md. Br. at 43), also masks a glaring legal contradiction in Maryland's position. Even assuming for the sake of argument that Maryland's consent to federal water withdrawals for the District of Columbia was required,[363] Maryland's 1853 law said nothing about giving Maryland the right to regulate the

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[362] Maryland is also incorrect when it claims that "[w]hen the Great Falls Manufacturing Co., a Virginia corporation, sued to press its claims to water rights in the Potomac against the Aqueduct's withdrawals, it went to the Circuit Court for Montgomery County, Maryland." Md. Br. at 44. In fact, that condemnation proceeding was instituted by the United States against the company, not the other way around. *United States v. Great Falls Mfg. Co.*, 112 U.S. at 649; *United States ex rel. Washington Aqueduct v. Great Falls Mfg. Co.* (Montgomery Co. 1858), *reprinted in* Sen. Ex. Doc. 42, 35th Cong., 2d Sess. 2 (1859) [VX 6]. The company had no choice about where it was sued. The United States Court of Claims was not created until 1863, and the Act of Congress providing for condemnation proceedings relating to the Aqueduct specified that the suit be brought in state court. 112 U.S. at 648-49; Act of April 8, 1858, ch. 15, 11 Stat. 263 (1858) [VX 284]. The land owned by Great Falls Manufacturing Company that was the subject of the 1858 condemnation proceeding included not only property on the Virginia shore, but Conn's Island, in the middle of the River. *See United States ex rel. Washington Aqueduct*, Sen. Ex. Doc. 42 at 2-3 [VX 6]. Congress did not provide for actions relating to the Aqueduct to be filed in the Court of Claims until 1882. *See* Act of July 15, 1882, ch. 294, 22 Stat. 168, 169 (1882) [VX 285]. When Great Falls Manufacturing Company later filed suit against the United States for a determination of the value of its property taken between Conn's Island and the Virginia shore, it filed in the Court of Claims. *Great Falls Mfg. Co. v. Garland*, 124 U.S. at 598-99.

[363] That assumption is probably wrong. *See Arizona v. California*, 283 U.S. 423, 451 (1931) (holding that Congress had the authority to authorize the Boulder Canyon dam and reclamation project under its authority to control navigation, without complying with Arizona's state law permitting requirements, even though the purposes of the project included irrigation and water supply); *id.* at 457-58 & nn. 8-10 (leaving open the question of whether the project would have been authorized for purposes not including navigation, such as "irrigating public lands of the United States," "regulating the flow and preventing floods in this interstate river," or "as a means of conserving and apportioning its waters among the States equitably entitled thereto."); *see also* U.S. Const. Art. I, § 8, Cl. 17 (granting Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of Government of the United States. . . ."); *id.* Art. IV, § 3, Cl. 2 ("The Congress shall have

(continued...)

quantity of water withdrawn by the Aqueduct. Rather, it was an assent "to purchase such lands, and to construct such dams, reservoirs, buildings and otherwise" as may be needed to supply the District of Columbia with water.[364] Maryland's consent was neither sought nor required when Congress decided in 1926 to have the Aqueduct extend water service to Arlington County, Virginia,[365] nor in 1947 when service was extended to the city of Falls Church, Virginia.[366] Maryland has never required water appropriation permits for the Aqueduct,[367] and the Aqueduct "claims exemption" from its permitting laws.[368] Just as Maryland's 1853 law consented to the use of the Potomac River for the Aqueduct, so too did Article VII of the Compact of 1785, and Clause IV of the Black-Jenkins Award, consent to the use of the River by Virginia and its citizens, even assuming that such "consent" was legally necessary.

3. Maryland's Remaining "Contemporaneous" Evidence.

The remaining "contemporaneous" evidence of the parties' supposed construction of the Compact of 1785 is not contemporaneous at all, but arose only long after the boundary was finally settled in 1877. Maryland places much emphasis on proving that it has, but Virginia has

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Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."). Indeed, the Corps in 1976 declined to accept Maryland's proposed draft of the Potomac River low flow legislation that would have grounded Congress' authority to impose low flow requirements on Maryland's claimed authority under Congress' Act of March 3, 1853, 10 Stat. 189 (1853). *Compare* Letter from Coulter to McGarry dated 12/16/75, at 1-2 [MD-MDE-16433-35] [VX 147] *with* Letter from McGarry to Coulter dated 1/19/76, at 1-2 [MD-MDE-22035-36] [VX 148].

[364] 1853 Md. Laws ch. 179 [VX 317].

[365] Act of Apr. 14, 1926, ch. 140, § 1, Pub. L. No. 69-118, 44 Stat. 251 [VX 286].

[366] Act of June 26, 1947, ch. 149, § 1, Pub. L. No. 80-118, 61 Stat. 181 [VX 287].

[367] Sachs Dep. at 74-75 [VX 139]; Pajerowski Dep. at 111 [VX 140].

[368] Md. Ex. X ¶ 74.

not: enforced criminal laws on the Maryland side of the boundary line; issued various licenses to a handful of establishments located offshore of Virginia for liquor sales, gaming, and off-track-betting; imposed income taxes and sales taxes on activities carried on at those offshore establishments; and regulated dredging of the riverbed on the Maryland side of the line. Md. Br. at 12-13, 45-60.[369] None of those activities has anything whatsoever to do with Virginia's right to withdraw water from the Potomac River or to build improvements from the shore. Accordingly, that evidence has no probative value.

By contrast, Maryland's recent practice of issuing permits for water withdrawal and waterway construction is relevant to Maryland's defense that Virginia has lost its compact rights by allegedly acquiescing in Maryland's permitting authority. It is also appropriate to consider whether the two states have imposed real property taxes on improvements extending from the Virginia shore. But virtually all of Maryland's evidence on these subjects arose *after* 1950.[370]

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[369] As to dredging in the riverbed, Maryland cites *Bostick v. Smoot Sand & Gravel Corp.*, 260 F.2d 534 (4th Cir. 1958), out of context. Md. Br. at 13. The issue there was whether a Maryland statute that gave a "riparian owner" the right to dredge in the channel of the Potomac River was intended to benefit landowners on *both* shores of the Potomac, or just Maryland landowners. The district court held that the Compact of 1785 and the Black-Jenkins Award did not apply because the dredging at issue was in the channel of the River on the Maryland side of the boundary. *Bostick v. Smoot Sand & Gravel Corp.*, 154 F. Supp. 744, 751, 750, 760 (D. Md. 1957). The court went on to hold that the Maryland statute could not have been intended to give Virginia landowners gratuitous rights in the riverbed -- "Especially is this so in view of the decidedly less than brotherly love of Maryland toward Virginia, before, at, and after the legislation here involved." *Id.* at 753 (footnotes omitted). The U.S. Court of Appeals for the Fourth Circuit reversed because the statute on its face appeared to give rights in the riverbed itself to *any* riparian owner, irrespective of citizenship. 260 F.2d at 539. Contrary to Maryland's suggestion, neither the district court nor the court of appeals held that Maryland was entitled to control or regulate either Virginia's compact rights or the construction of improvements appurtenant to the Virginia shore.

[370] Maryland's reliance on *O'Neal v Virginia & Maryland Bridge Co.*, 18 Md. 1 (1861), is misplaced. First, the court did not reach any compact issues and found that the property that was taxed was entirely within the boundaries of Maryland. *Id.* at 23 ("The admissions of fact, to be found in the agreement, on which this case was tried, render it unnecessary to examine the

(continued...)

Conduct after 1950 – more than 165 years after the Compact of 1785, and more than 70 years after the Black-Jenkins Award – is hardly "contemporaneous" evidence of the meaning of those agreements.[371] That evidence is simply post-compact conduct that is relevant, if at all, only to a *defense* that rights protected by the compact were subsequently lost. The post-1950 evidence is therefore addressed in Part II of the Argument below, in response to Maryland's claims based on prescription and acquiescence.

C. Maryland's Police Power Argument is Unfounded Because the Territorial Boundary Was Disputed in 1785.

Maryland's police power argument fails on grounds other than the plain language of the Compact of 1785 and the Black-Jenkins Award. Maryland argues at length that its police power authority derives from its territorial ownership of the River to the low-water mark on the Virginia shore, and that there should be a strict construction against relinquishment of any such

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points that were so fully argued at bar, touching the inter-state rights of Maryland and Virginia. It is admitted that the property on which this tax was assessed, lies within the limits of Washington county, in this State. . . ."). Second, as the Master has already pointed out, *O'Neal*, along with two other Maryland cases, was "decided prior to the Black-Jenkins Award of 1877. . . . These facts destroy any weight the Maryland state court cases might have had in the context of the present controversy." Mem. Dec. No. 4, at 17-18.

[371] *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (statutory interpretation adopted 24 years after enactment of statute was not contemporaneous); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 463 n.12 (1989) (statutory construction finalized more than ten years after passage of statute was not contemporaneous construction); *Lowe v. S.E.C.*, 472 U.S. 181, 207 n.52 (1985) (agency's construction that was not developed until 37 years after passage of statute was not entitled to the deference given to a contemporaneous construction); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (guideline promulgated eight years after enactment of statute was not contemporaneous construction); *Wisconsin Cent. R.R. Co. v. United States*, 164 U.S. 190, 205 (1896) (postal department's construction of statute 11 years after its passage was not contemporaneous); *cf. EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (agency rule formulated the year after passage of the statute and same year as creation of agency was contemporaneous construction); *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 364 U.S. 137, 154 & n.20 (1960) (ruling made by commissioners who had been in office during passage of statute was contemporaneous construction).

sovereign authority. Md. Br. at 30-38. But the Special Master has previously recognized that the existence of the boundary dispute at the time of the Compact of 1785 completely vitiates this argument. *See* Mem. Dec. No. 4, at 20-21 & n. 29.

Notwithstanding that prior ruling, Maryland tries to re-argue that the boundary with Virginia was (or at least should have been) clear as of 1785. Maryland's argument again ignores history as well as this Court's prior decisions. When Virginia's Potomac River access rights were first codified in Article VII of the Compact of 1785, the boundary line was hotly contested, with Virginia claiming to the Maryland shore and Maryland claiming to the Virginia shore. *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 63-64 (1921) ("The compact between Virginia and Maryland in 1785 . . . says nothing about the boundary in terms. . . . [I]t left the question of boundary open to long-continued disputes."); *Morris v. United States*, 174 U.S. 196, 224 (1899) (explaining that both of the conflicting grants to Lord Baltimore and Lord Culpeper included the entire Potomac River and that, "the controversy as to the true boundary still continuing, in 1874 the legislatures of the two states agreed in the selection of arbitrators, by whose award, dated January 16, A. D. 1877, the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore."); *see also* Mem. Dec. No. 4, at 20-21 & nn. 29-30. Even *Maryland's* highest court recognized in 1946 that Virginia did not yield her claim to the entire river until 1877:

> [The Compact of 1785] had nothing to do with boundaries as such. But the boundary disputes gave rise to frequent conflict as to jurisdiction over the waters of the Potomac River, the Pocomoke River, and certain parts of Chesapeake Bay, and the rights of citizens of the two states on these waters and adjacent thereto. . . . *Virginia did not yield up her claim to the rest of the river until the boundary settlement in 1877 hereinafter referred to. . . It was not until 1877, therefore, that the Potomac River boundary between the two states was finally settled.*

Barnes v. Maryland, 186 Md. 287, 292-93, 47 A.2d 50, 52-53 (1946) (emphasis added).

Thus, when the two States approved Article VII of the Compact of 1785, recognizing equal rights of access to, and use of, the River, it was against a background of uncertainty as to where the boundary would ultimately be drawn. Maryland's Attorney General explicitly recognized this point in his pleadings in *Wharton v. Wise*, 153 U.S. 156 (1894):

> To construe the compact correctly we must go back to the time when it was made. *Then the boundary between the two States was unsettled and in dispute, and the claims of the State[s] were widely divergent.* . . . Could Maryland, at that time, while the territorial limits and jurisdiction of the two States were unsettled, and controverted, have reasonably claimed in the face of this language of the compact that she had a wider and more comprehensive right of fishing in the river than Virginia had?
>
> And if she could not then have fairly and properly made such claim, she cannot make it now, although her boundary is now settled, and the bed of the Potomac is now decided to be within her territory.[372]

As Maryland conceded in *Wharton v. Wise*, the States' agreement in Article VII that each would have equal access rights to the Potomac River was not altered by the fact that, ninety years later, arbitrators ultimately resolved the boundary to be at the low-water mark on the Virginia shore.

Under these circumstances, the idea that Virginia's Potomac River access rights under Article VII could be regulated by Maryland, or Maryland's rights by Virginia, certainly would have astounded the drafters of the Compact of 1785. In 1785, under the Articles of Confederation then in place, not even Congress had the power to regulate one state's navigation or use of an interstate river. The Declaration of Independence had declared that, as "Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right

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[372] Attorney General of Maryland, Brief of Appellant at 23-24, *Wharton v. Wise*, No. 1054 (U.S. 1893) (emphasis added) [VX 61].

do."[373] Article II of the Articles of Confederation had provided that: "Each state retains its sovereignty, freedom, and independence, and every power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[374]

We know the views of Samuel Chase, one of Maryland's commissioners to the Mount Vernon conference, concerning the nature of state sovereignty under the Articles of Confederation. Writing as Associate Justice for this Court, he explained:

> In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. *I consider this as a declaration,* not that the United Colonies jointly, in a collective capacity, were independent states, etc. but *that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.*

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 224 (1796) (emphasis added); *see also Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.) ("There is, likewise, a material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution.").

We also know the views of George Mason, the lead Virginia commissioner. When the Constitution's framers decided in Philadelphia in 1787 to propose giving Congress the power to regulate interstate commerce, a fierce debate ensued over whether such power should require a

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[373] Declaration of Independence [VX 280A].

[374] Articles of Confederation, Art. II. Indeed, in contemporary usage, our founding fathers often referred to their State as their "Country." *E.g.*, 1 James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 48 (G. Hunt & J. Scott, eds., 1987) (statement of Edmond Randolph on June 2, 1787, referring to Virginia as "the Country which sent him" to the Constitutional Convention) [VX 280A].

two-thirds vote or a simple majority vote.[375] Charles Pinckney of South Carolina observed: "The power of regulating commerce was a pure concession on the part of the S. States."[376] George Mason, in particular, staunchly advocated a two-thirds requirement.[377] He feared that, "[b]y requiring only a majority to make all commercial and navigation laws, the five Southern States . . . may <will> be ruined. . . ."[378]

If the Compact's framers in 1785 did not believe that Congress could regulate the States' use of waterways, they certainly would not have thought that a single state could regulate its sister state's use of a waterway. The concept that Maryland would regulate Virginia's access to the Potomac River would have been astonishing.

Because the Compact of 1785 "left the question of boundary open to long-continued disputes," *Marine Railway & Coal Co.*, 257 U.S. at 64, the three principal authorities upon which Maryland relies are inapposite. In each of those cases, the Court found that one State held title to submerged lands based upon a prior compact or territorial cession that was *intended to resolve* forever the question of territorial boundary and sovereignty. In *Massachusetts v. New York*, 271 U.S. 65 (1926), the Court held that the 1786 Treaty of Hartford gave New York "rights as a sovereign state in the granted territory," *id.* at 87, which necessarily included submerged lands in the navigable waters of Lake Ontario. *Id.* at 84-90. The Court based that finding on the

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[375] *See* 2 Max Farrand, ed., *The Records of the Federal Convention of 1787* 449-53, 631 (Rev. Ed. 1937) [VX 276].

[376] *Id.* at 449.

[377] *Id.* at 451, 631.

[378] G. Mason, *Objections to This Constitution of Government* (Sept. 1787), *reprinted in* 2 Farrand, *supra* note 375, at 639 [VX 276]. Mason was one of three framers who refused to sign the Constitution in Philadelphia. *Id.* at 648-49.

"proper construction of the technical language" of the Treaty. *Id.* at 90. In *Central Railroad Company of New Jersey v. Mayor of New Jersey*, 209 U.S. 473 (1908), the decision likewise turned "upon the construction of [the] agreement made between New Jersey and New York for the purpose of settling the territorial limits and jurisdiction of the two states, which previously had been the subject of dispute." *Id.* at 477. The Court found it "plain on the face of the agreement," *id.* at 478, that New York and New Jersey had intended for the compact of 1834 to give New Jersey sovereignty over the land in question, which was on the New Jersey side of the boundary settled by the compact. *Id.* at 477-79. In *Martin v. Waddell*, 41 U.S. (16 Peters) 367 (1842), the Court held that the State of New Jersey acquired sovereignty to its submerged lands upon the American Revolution and that any contrary private claims based on ancient grants from the Duke of York were extinguished in 1702, when the Duke expressly surrendered to the Crown all claims to the territory in question, including "all the powers, authorities and privileges of and concerning the government of the province. . . ." *Id.* at 416.

Thus, Maryland errs in relying on the "presumption" against the separation of sovereignty from territorial ownership. Md. Br. at 31. For instance, since the clear language of the Treaty of Hartford gave New York sovereignty over the territory at issue in that case, there was a "presumption" that this included ownership of the submerged lands beneath a non-tidal but navigable water body such as Lake Ontario. *Massachusetts v. New York*, 271 U.S. at 89.[379] For Massachusetts to have retained ownership of the submerged lands would have been inconsistent with "the avowed purpose of the treaty to settle all controversies with respect to the area

[379] Incidentally, the Court held that the phrase "to the Shore," as used in the 1786 Treaty, referred to the water's edge of Lake Ontario, notwithstanding that it was a *non-tidal* water body. *Id.* at 92-93. That holding reinforces the Special Master's previous finding that "the record contains ample evidence of the contemporaneous use of the terms 'navigation' and 'shores' to apply to non-tidal waters." Mem. Dec. No. 4, at 18.

described, and these included conflicting claims of sovereignty as well as disputes with respect to proprietary rights." *Id.* at 88-89.

No such presumption could operate in this case because the Compact of 1785 did not settle questions of boundary or sovereignty. Indeed, Virginia claimed for many decades thereafter that the boundary was on the Maryland shore.[380] Far from granting Maryland any unilateral authority, Virginia and Maryland agreed in Article VIII to exercise concurrent jurisdiction for all laws concerning fishing and navigation.[381] And, as the Special Master has pointed out, Articles X and XII of that Compact established jurisdictional rules for prosecuting certain crimes and offenses, seizing property, and for service of process on the River.[382] The fact that Article VII of the Compact was silent about Maryland's ability to regulate Virginia's construction of improvements from the shore hardly shows that the parties intended for Maryland to have such powers by implication or reservation. The obvious inference -- the only reasonable inference -- is that each state intended in Article VII to regulate the exercise of its *own* citizens' construction activities only.

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[380] Black and Jenkins pointed out in 1877 that "[t]he State of Virginia, through her Commissioners and other public authorities" had claimed "for many years" that the boundary was on the Maryland shore of the Potomac. Board of Arbitrators, *supra* note 324, at 6 [VX 64]; *see also* Commission (Maryland) on Boundary Lines Between Virginia and Maryland (1870-1874), *supra* note 331, at 19, 329 (Virginia commissioners insisting that the boundary was on the Maryland shore) [VX 68]. West Virginia, of course, maintained the same claim in its Cross-Bill in *Maryland v. West Virginia*. *See Maryland v. West Virginia*, 217 U.S. 1, 24 (1910).

[381] Compact of 1785, art. VIII, 1785-86 Md. Laws ch. 1, 1785-86 Va. Acts ch. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823) [VX 1]. *See also Hendricks v. Virginia*, 75 Va. 934, 940 (1882) ("The effect of this article [VIII] is to give the State of Virginia concurrent jurisdiction with the State of Maryland, over the Potomac river from shore to shore. . . .").

[382] Mem. Dec. No. 4, at 35 & n.60. *See also* Letter from Madison to Muter of 1/7/1787, 9 Robert A. Rutland, *The Papers of James Madison* 230-31 (1975) (stating that the Potomac River was an example of "concurrent jurisdiction" between two States) [VX 111].

Nor did Maryland and Virginia ever agree that, once the boundary was finally determined between them, the terms of one state's Potomac River access rights could thereafter be regulated by the other. To the contrary, the States expressly agreed that the Compact was "never to be repealed, or altered, by either, without the consent of the other."[383] As a precondition to the Black-Jenkins Award, both states likewise agreed that "neither of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact [of 1785] . . . but that the same shall remain to and be enjoyed by the said states and the citizens thereof *forever*."[384] These provisions make it quite clear that nothing in the boundary settlement could have altered the scope of Virginia's Potomac River access rights or given Maryland any authority to regulate those rights that it did not possess before the boundary was determined.

D. Maryland's Police Power Argument Conflicts with the Law Governing Disputes Between States.

Maryland's "police power" argument is also based on the flawed assumption that Maryland law would apply to Virginia's Potomac River access rights in the absence of "unmistakable" language to the contrary. That assumption is wrong on numerous levels, and the cases relied upon by Maryland for that proposition are inapposite.

1. The Unmistakability Doctrine is Inapplicable.

Maryland's police power argument fails because it is not based on cases involving interstate compacts. As the plurality explained in *United States v. Winstar Corp.*, 518 U.S. 839

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[383] Compact of 1785, art. XIII, 1785-86 Md. Laws ch. I, 1785-86 Va. Acts ch. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823) [VX 1].

[384] 1874 Va. Acts ch. 135 § 1 [VX 44], 1874 Md. Laws ch. 247 § 1 [VX 43] (emphasis added).

(1996), upon which Maryland relies, Md. Br. at 33, 35, the "reserved powers" cases and the "unmistakability doctrine" are "two distinct limitations developed to protect state regulatory powers." *Id.* at 874. Most often invoked in cases arising under the Contract Clause, these doctrines derive from the theory of parliamentary governance, originating with Blackstone, that "one legislature may not bind the legislative authority of its successors," because the two are of equal dignity. *Id.* at 872. That principle underlies the primary cases upon which Maryland relies.[385] While this principle continues to have validity in American jurisprudence, it is obviously limited by *constitutional* restrictions imposed on the legislature. *Winstar*, 518 U.S. at 872-73. As Justice Harlan stated long ago, "[d]efinitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." *New Orleans Gas-Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co*, 115 U.S. 650, 661 (1885).[386]

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[385] *E.g.*, *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 459 (1892) ("every succeeding legislature possesses the same jurisdiction and power as its predecessor; . . . the latter have the same power of repeal and modification which the former had of enactment, – neither more nor less; . . . all occupy in this respect a footing of perfect equality"); *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (stating that legislatures "can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'"); *see also New Orleans Gas-Light Co.*, 115 U.S. at 669 ("[O]ne legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals.").

[386] *See also Mugler v. Kansas*, 123 U.S. 623, 663 (1887) ("Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guarantied by that instrument, or interfere with the execution of the powers confided to the general government.").

The Compact Clause of the Constitution, Art. I, § 10, Cl. 3, provides precisely the type of constraint that prevents a State legislature from invoking its claimed police power authority to undo the work of a prior legislature. When a state enters into a compact with a sister state, and that compact is approved by Congress, the compact becomes a federal law and the signatory states are bound by it under the Supremacy Clause. As the Court stated in *Oklahoma v. New Mexico*, 501 U.S. 221 (1991), "Congressional consent elevates an interstate compact into a law of the United States. . . Thus, 'unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.'" *Id.* at 245 (*quoting Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

It is, therefore, no impediment to an interstate compact that the compact limits or restricts one state's sovereignty vis-à-vis the other state. "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power." *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Accordingly, "[t]he States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority." *Id.* at 52 (citations omitted).[387]

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[387] *See also* 72 Am. Jur. 2d *States, Territories, and Dependencies* § 5 (1974) ("A compact between states is not invalid upon the ground of its surrendering rights of sovereignty, which are inalienable."); *West Virginia Ex Rel. Dyer v. Sims*, 341 U.S. at 34 (1951) ("Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action.") (Reed, J., concurring); *Virginia v. West Virginia*, 238 U.S. 202, 234 (1915) ("Nor can it be deemed in derogation of the sovereignty of the state that she should be charged with interest if her agreement, properly construed, so provides. The fundamental question is, What does the contract mean?"); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 88-89 (1823) (holding that compact between Virginia and Kentucky was not

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2. Federal Common Law Applies in the Absence of an Interstate Compact.

Maryland's police power argument also fails because it is based on the premise that, in the absence of an interstate compact, Maryland state law determines Virginia's rights of access to the Potomac River. To the contrary, as this Court has repeatedly made clear, *federal common law* applies "[w]hen we deal with air and water in their ambient or interstate aspects. . . ." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) [*Milwaukee I*]; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) (interstate water disputes "involve especial federal concerns to which federal common law applies"); *Vermont v. New York*, 417 U.S. 270, 277 (1974) (per curiam) ("Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a 'common law' formulated over the decades by this Court."); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which *neither the statutes nor the decisions of either State can be conclusive.*") (emphasis added); *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (quoting *Hinderlider* for proposition "that no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties").

In the seminal case of *Kansas v. Colorado*, the Court stated: "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." 206 U.S. 46, 97 (1907). In building federal

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invalid "because it involves a principle which might be inconvenient, or even pernicious to the State" in some respect).

common law around that cardinal principle, the Court considers, but is not bound by, the substantive law of the contending states. *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931) ("For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require.").

The rule of equality of right under federal common law applies to the States' respective claims on an interstate stream, even where one state owns the entire riverbed. Thus, the Court has ruled that the fact that an interstate stream flows entirely through an upstream state gives that state no *per se* right to ownership or use of that water to the detriment of its downstream neighbor. *Colorado v. New Mexico*, 459 U.S. 176, 181 n.8 (1982); *Texas v. New Mexico*, 462 U.S. 554, 569 n.15 (1983) ("[O]ne answer is clear: no one State can control the power to feed or to starve, possessed by a river flowing through several States.") (*quoting* Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L. J. 685, 701 (1925)). As the Court explained in *New Jersey v. New York*, 283 U.S. 336 (1931):

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be.

Id. at 342-43.

Federal common law applies more broadly than simply to questions of equitable apportionment of an interstate stream. It applies to the apportionment of other natural resources

claimed by two states.[388] It applies to determine the effect of a change in the bed of a stream on the boundary between two states.[389] It applies to controversies arising out of accidents occurring on an interstate stream, pursuant to the admiralty jurisdiction of federal courts.[390] It has also been applied in the context of multi-state pollution of interstate streams. Thus, in *Milwaukee I*, the Court held that federal common law governed whether one state could enjoin another state or its municipalities from polluting an interstate water body. 406 U.S. at 103, 105-06.[391] Although the field of interstate pollution law since *Milwaukee I* has been occupied entirely by legislation enacted by Congress,[392] the Court has made clear that, in the absence of such legislation, federal common law would prohibit one State from invoking its *own* statutory or judge-made law to

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[388] *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983) (holding that the doctrine of equitable apportionment applied to the allocation of anadromous fish migrating through an interstate river).

[389] *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977) ("If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary."); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 281-82 (1982) ("[T]he effects of accretive and avulsive changes in the course of a navigable stream forming an interstate boundary is determined by federal law.").

[390] *Mullenix v. United States*, 984 F.2d 101, 103-04 (4th Cir. 1993) (holding that the Potomac River in West Virginia was "navigable" for purposes of admiralty jurisdiction, so that federal common law, rather than Maryland state law, applied to questions of comparative negligence).

[391] The Court in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), had suggested that an interstate dispute between a State and a private company should be resolved by reference to state nuisance law. *Id.* at 498 n.3 ("[A]n action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law.") (*citing Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). The Court overruled that dictum in *Milwaukee I*, 406 U.S. at 102 n.3; *see also Milwaukee v. Illinois*, 451 U.S. 304, 327 n.19 (1981) [*Milwaukee II*] (recognizing overruling); *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (same).

[392] *See Milwaukee II*, 451 U.S. at 317-18; *Ouellette*, 479 U.S. at 489; *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981).

control *another* State's discharge of pollutants. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("*Milwaukee I* therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was preempted.").

Accordingly, even if there were no interstate compact giving Virginia a right of access to the Potomac River, federal common law, and not the statutes or common law of Maryland, would govern Virginia's access rights. "Neither State can legislate for or impose its own policy upon the other." *Kansas v. Colorado*, 206 U.S. at 95. Or, as the Seventh Circuit put it in its decision on remand from this Court: "[e]ach of these states has an interest in the use of the river, ***but the laws of one state cannot control the use of the river by citizens of other states.***" *Illinois v. Milwaukee*, 731 F.2d 403, 408 (7th Cir. 1984) (citation omitted) (emphasis added).

3. Maryland is Systemically Incapable of Fairly Regulating Virginia's Potomac River Access.

The fact that federal common law applies to disputes between states dovetails with the framers' decision in Article III of the Constitution to entrust, to the Supreme Court alone, controversies between two states. The framers rightly concluded that one state was systemically incapable of adequately protecting the interests of a sister state. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (explaining that one principle underlying Court's original jurisdiction "was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1794) (Court's original jurisdiction extends to "controversies between two or more states; because domestic tranquility requires, that the contentions of states should be peaceably terminated by a

common judicatory; and because, in a free country justice ought not to depend on the will of either of the litigants.").[393]

Explaining the purpose of Article III's jurisdictional provisions, Alexander Hamilton wrote in Federalist No. 80:

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, *the national judiciary ought to preside in all cases in which one State* or its citizens *are opposed to another State* or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, *it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.*
>
> . . .
>
> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. *No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.* . . . Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. *The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the -*

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[393] *See also South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (O'Connor, J., concurring) ("[B]ecause the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channelled to the federal courts. The one textual exception to that rule concerned the original jurisdiction, where the Framers apparently mandated that Supreme Court review be available. 'The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government.' *Ames v. Kansas*, 111 U.S. 449, 464 (1884). The Framers apparently thought that '[s]o much was due . . . the rank and dignity of those for whom the provision was made . . . .' *Ibid.*; *see also* The Federalist No. 81, pp. 507-509 (H. Lodge ed. 1888) (A. Hamilton). Perhaps more importantly, the Framers also thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon.").

> *grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.*[394]

Hamilton's argument that one state could not be expected to adequately protect the interests of a sister state was echoed by this Court in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States."). Chief Justice Marshall applied similar reasoning in 1819 to reject Maryland's claim that it could be trusted not to overtax a branch of the Bank of the United States. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431-32 (1819). "But is this a case of confidence?" he asked. "Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests?" *Id.* at 431.

Just as it was not proper to place trust in the laws of Maryland to treat fairly an instrumentality of the United States, most of whose citizens were not citizens of Maryland, so too is it improper to permit Maryland to control Virginia's access to a vital interstate stream, since Maryland governmental officials have no Virginia constituents whatsoever. This is not just a theoretical argument about the inability of the Maryland system to fairly protect Virginia's

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[394] The Federalist No. 80, at 478-79 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added) [VX 277]; *see also* The Federalist No. 81, at 487 ("In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.") [VX 277].

interests in the Potomac River. There are at least three examples of the inadequacy of Maryland's system in this case.

First, Maryland's courts have erroneously interpreted Virginia's Potomac River rights under the Compact of 1785 as being limited to the tidal portion of the River.[395] Those state court rulings consistently favored Maryland over its neighbors and sought to diminish rights clearly protected by interstate compact. As the Special Master observed about the most recent of those decisions, *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926), Maryland's highest court "inexplicably failed" to mention this Court's controlling authority in *Maryland v. West Virginia*, 217 U.S. 577 (1910). Mem. Dec. No. 4 at 17; *see also id.* at 42. That omission appears to vindicate Hamilton's warning in Federalist No. 80 that it is only "natural that the judges, as men, should feel a strong predilection to the claims of their own government."[396]

Second, the plain language of the permit statute applied by Maryland officials to regulate access to the Potomac River states that Maryland's policy is to protect "the best interests of the people *of Maryland*." Md. Code Ann., Envir., § 5-501 (Michie 1996) (emphasis added). The best interests of the people of Virginia are not mentioned.

Third, Maryland's recent treatment of the FCWA casts serious doubt that Maryland is capable of avoiding parochial influence on any issue involving interstate rivalry or competing demands on the water supply. As discussed extensively above, numerous Maryland state

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[395] *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926); *United States ex rel. Washington Aqueduct v. Great Falls Mfg. Co.*, (Montgomery Co. 1858), *reprinted in* Sen. Ex. Doc. 42, 35th Cong., 2d Sess. 2 (1859) [VX 6]; *Binney's Case*, 2 Bland 99 (Md. Ch. 1829) [VX 4].

[396] The Federalist No. 80, *supra* note 394, at 479 [VX 277].

legislators successfully lobbied MDE to deny the permit to the FCWA.[397] Many were motivated by their stated belief that denying the permit would help control economic growth in Northern Virginia or favor suburban-Maryland in its economic competition with Virginia.[398] Some claimed that Virginia's supposed disregard for sound environmental policies had caused the problem with shoreline water quality,[399] notwithstanding that the water quality problem, in fact, was the same or worse on the Maryland side.[400] In her reelection campaign in 1998, Maryland Delegate ~~Gryor~~ publicly claimed credit for MDE's decision to deny the permit to the FCWA.[401] Likewise, Maryland's Governor claimed as early as February 1998 that *he* had decided to deny the permit.[402] Since then, the Governor has repeatedly stated that his opposition to the project was based on his belief that Maryland needed to curb urban "sprawl" in Virginia.[403]

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[397] *See supra* text accompanying notes 197-201, 205-16, 223-26, 230-32.

[398] *See supra* text accompanying notes 198-99, 206, 210, 216, 246, 259, 261-62, 309.

[399] *See supra* text accompanying notes 201, 216, 232.

[400] *See supra* text accompanying notes 179, 208; ALJ Ruling, *supra* note 168, at 81 ("All of the available water quality information reflects that the raw water quality along the Maryland shore at the site of the WSSC's intake is as poor, if not poorer than, the water quality at the Authority's shore intake."). [VX 248].

[401] Defendant's Answers to RFA Nos. 24-25 & Ex. 12 [VX 141].

[402] Defendant's Answer to RFA No. 27 & Ex. 13 (Letter from Glendening to Mathwin dated 2/9/98, stating: "Based on the evidence provided, *I* decided that the public interest would be best served by avoiding impacts to the Potomac River from the installation of the proposed intake.") (emphasis added) [VX 141].

[403] *See supra* text accompanying notes 308-09; Declaration of Roberta Smith ¶ 2 [VX 134] (Governor Glendening claimed on public radio broadcast that Virginia was using the River "only to permit more sprawl" and stating "we'll give you water but don't pollute the River."). The original declaration was included as Exhibit D to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness (filed 6/8/01).

Delegate Cryor and Senator Van Hollen then repeatedly targeted Virginia's water withdrawal in the Maryland General Assembly.[404] Senator Van Hollen made clear that the purpose of his bill, the "Potomac River Protection Act," was to cap the amount of water that Northern Virginia could withdraw from the Potomac, thereby preventing Virginia from "fueling" further growth, "which has been out of control."[405] His bill was amended, by contrast, to exempt three Maryland concerns from its restrictions.[406]

The *only* reason that the Bill did not succeed in blocking the FCWA project was because Senator Van Hollen amended it at the last minute, in response to this pending original action. Senator Van Hollen explained to the Governor and the media that, if the Bill had restricted the FCWA's project, it would have harmed Maryland's position in this Court and "jeopardize[d] Maryland's control of the Potomac River."[407] Allowing the project to go forward, by contrast, would enable the Maryland Secretary of Environment "to negotiate a settlement of the legal proceedings on favorable terms should the opportunity arise."[408] Van Hollen nonetheless insisted in his amendment that the pipeline contain a built-in limitation, physically restricting the flow to the amount approved by MDE through its water appropriation permitting system.[409] "We don't want Virginia to willy-nilly withdraw large amounts out of the Potomac to fuel

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[404] *See supra* text accompanying notes 235-36, 237-39, 244-46, 248-78.

[405] *See supra* text accompanying notes 261-62; 405.

[406] *See supra* text accompanying note 265.

[407] *See supra* text accompanying notes 270-76.

[408] *See supra* text accompanying note 276.

[409] *See supra* text accompanying notes 271-72.

development on its side of the river," he explained; "[w]e'd have the key to physically adjust it."[410]

It took the FCWA more than five years to obtain a waterway construction permit, at a cost of hundreds of thousands of dollars in litigation expenses, and millions of dollars in unnecessary solids treatment costs that would have been avoided had this obstacle not been encountered.[411] After years of delay and obstruction, the Maryland administrative law judge found that MDE had offered "virtually no credible evidence" to justify denying the permit.[412] The circuit court of Baltimore City found not only that substantial evidence supported the need to construct the project, but that MDE had treated the FCWA unfairly in trying to appeal the decision of its own appointed final decision maker, pursuing an approach under which "there was no way the Authority could win."[413] Although the FCWA ultimately prevailed in the litigation by proving the need for the offshore intake project, at no time in the administrative process did Maryland give any deference to the considered views of the Virginia Department of Health that the project represented "an essential public health initiative for the more than one million Virginians and their visitors who use Fairfax County Water Authority drinking water on a daily basis."[414]

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[410] Defendant's Response to RFA No. 71 [VX 141].

[411] Crowder Decl. ¶ 6 [VX 126].

[412] ALJ Ruling, *supra* note 168, at 45 [VX 248].

[413] Baltimore City Circuit Court, Memorandum Opinion at 8-9 (Apr. 10, 2001) [VX 256].

[414] Facsimile transmittal from Taylor to Clark dated 10/30/97, attaching Letter from Gordon to Crowder dated 10/29/97 [FCWA/MDE Joint Ex. 168] [VX 223]; Defendant's Answer to RFA No. 17 & Ex. 10 [VX 141]; *see also* Answer ¶ 25 (last sentence).

The appearance of political manipulation to block the FCWA's project is overwhelming. It is far stronger than the evidence upon which this Court has relied in other contexts in striking down state action because of parochial motivation.[415] Virginia's controversy with Maryland concerning the offshore intake project amply demonstrates what constitutional theory and this Court's prior case law have established: "A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies, is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28.

E. Maryland's Interest in Protecting the Drinking Water Supply for Itself Does Not Support Allowing it to Control Virginia's Water Withdrawals.

The only "police power" consideration that could support subjecting Virginia to Maryland's water appropriation permitting system would be the need to protect and conserve the vital supply of water provided by the Potomac River. That consideration is both factually and legally invalid, and it is not coincidental that Maryland has failed to assert that justification for its permitting system in its motion for summary judgment.

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[415] *E.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677 & n.23 (1981) (plurality opinion) (citing Governor's veto message on prior legislation to demonstrate Iowa's "parochial interest" in discriminating against out-of-state trucking in violation of the Commerce Clause); *id.* at 682 n.3, 685-7 (Brennan, J., concurring in judgment) (emphasizing that truck-length regulation should be invalidated solely in view of its protectionist purpose); *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (striking down New Jersey prohibition on the importation of waste under the Commerce Clause, stating: "The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, or to create jobs by keeping industry within the State, or to preserve the State's financial resources from depletion by fencing out indigent immigrants.") (citations omitted).

The consideration is legally invalid because, if there were a severe shortage of water, the LFAA has established an enforceable formula for equitably allocating water from the Potomac River to Maryland, Virginia and the District of Columbia, while protecting the environmental "flow-by."[416] The LFAA, an interstate compact approved by Congress,[417] would provide the governing rules concerning equitable apportionment, not Maryland's permitting system. When water in the River is not scarce and the LFAA is not in effect, Virginia has the *same* legal right as Maryland to withdraw water from the Potomac River, notwithstanding that Maryland owns the riverbed. *E.g.*, *Colorado v. New Mexico*, 459 U.S. at 181 n.8 (mere ownership of the riverbed did not give the upstream State the right to divert water to the detriment of the downstream State); *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (same).

Maryland's recent legislation barring any new intakes for several years, and its permitting system as applied to Virginia, attempt to circumvent this Court's requirement that a State seeking to prevent another State from diverting water from an interstate stream prove first by "clear and convincing evidence" that the diversion will cause it "real or substantial injury." *Colorado v. New Mexico*, 459 U.S. at 187 & n.13. Maryland could never make that showing if it had filed an original action to stop a diversion of water by Virginia. Maryland should not be able to achieve through the back door of a "permitting" system what this Court would not allow it to achieve through the front door of an original action.

The water scarcity rationale is also factually invalid as a justification for subjecting Virginia to Maryland's permitting authority because Maryland's permitting system has done

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[416] *See supra* text accompanying notes 111-12, 154-56.

[417] *See Cuyler v. Adams*, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

nothing to augment or improve the water supply for the Washington Metropolitan Area. As noted above, the Water Supply Coordination Agreement of 1982 and ancillary cost sharing agreements have established a system of cooperation among the three largest water suppliers that has resulted in the provision of 17 billion gallons of water storage in upstream reservoirs,[418] provided ample water through the year 2020,[419] and established a system of cooperation to provide for future water supplies and to minimize the risk of having to invoke restrictions under the LFAA.[420] Maryland's permit system did not facilitate those successes.[421] The State of Maryland is also not presently involved in seeking to create additional water supplies on the Potomac River for the future.[422] Nor is Maryland even in a position to regulate the single largest user of Potomac River water: the Washington Aqueduct. The Aqueduct withdraws nearly 67 billion gallons of water a year from the Potomac River to supply water to the District of Columbia, and to Arlington County and the City of Falls Church, Virginia.[423] It has two intakes on the Maryland shoreline with a combined daily withdrawal capacity of 600 MGD.[424] The

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[418] *See supra* text accompanying note 152.

[419] *See supra* text accompanying note 165.

[420] *See supra* text accompanying notes 136-39, 140-43, 159-62, 166-67.

[421] *E.g.*, Sachs Dep. at 30, 32-33, 69-70 [VX 139]; Pajerowski Dep. at 139-40, 142 [VX 140].

[422] Pajerowski Dep. at 164-65 [VX 140].

[423] Defendant's Answer to Interrogatories Ex. 3, Entry 28 [VX 142]; Pajerowski Dep. at 113, 116-18 [VX 140].

[424] Pajerowski Dep. at 110 [VX 140].

Aqueduct claims exemption from Maryland's permitting requirements,[425] and Maryland has never sought to require a permit for those withdrawals.[426]

Far from helping to improve interstate cooperation in the conservation and development of water resources, Maryland's permitting system poses a huge obstacle. It threatens the regional system because Virginia and its municipalities are confronted with a permitting process that can be delayed and manipulated by Maryland's elected officials. As the General Manager of the FCWA previously stated in this case, the FCWA's contribution of more than $9 million towards the construction, maintenance and operation of upstream reservoirs in Maryland and West Virginia, and its participation in the Water Supply Coordination Agreement, "is premised on its ability to withdraw water from the Potomac River on a fair and equitable basis with the other jurisdictions when needed to meet the demands of its customers."[427] Unfortunately:

> [T]he restrictions in the Maryland waterway construction permit, combined with the anticipated political opposition we expect from Maryland to increases in our future withdrawals, create significant uncertainty about the reliability of the Potomac River water supply for Northern Virginia. The currently demonstrated uncertainty of a fair and non-political evaluation of Virginia's water requirements by Maryland's water appropriation permitting system stands as a present obstacle to the FCWA's water supply planning.[428]

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[425] Md. Ex. X ¶ 74.

[426] Sachs Dep. at 74-75 [VX 139]; Pajerowski Dep. at 111 [VX 140].

[427] Crowder Decl. ¶ 8 [VX 126].

[428] *Id.* ¶ 8. *See also* Declaration of Dale C. Hammes [General Manager, Loudoun County Sanitation Authority ("LCSA")] ¶ 9 ("Maryland's delay of the Fairfax County Water Authority for 5½ years and its passage of SB 729, which prohibits or limits the issuance of intake construction permits, makes the orderly planning and design activities uncertain and more costly. Until LCSA's rights to access and use Potomac River water are freed from the impositions by Maryland, LCSA's ability to meet the water supply needs of Loudoun County is in jeopardy.") [VX 129]. The original declaration was included as Exhibit C to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness (filed 6/8/01).

There is, in short, no valid police power purpose that Maryland can persuasively assert in defense of applying its water appropriation permitting system to Virginia's water withdrawal rights.

Maryland cites dictum in this Court's opinion in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), for the proposition that a state has police power authority to "regulate water withdrawals within its boundaries." Md. Br. at 39. *Sporhase* is factually and legally inapposite because it did not involve a dispute between two States claiming rights in an interstate stream.

Sporhase was a citizen of Nebraska.[429] He argued, and the Court agreed, that it violated the dormant Commerce Clause for Nebraska to prohibit its citizens from transferring ground water to property in Colorado simply on the basis that Colorado law prohibited the transfer of ground water into Nebraska.[430] Such a reciprocity requirement, the Court noted, "cannot, of course, be justified as a response to another State's unreasonable burden on commerce."[431] The Court observed in dictum that Nebraska had a legitimate interest in conserving and preserving ground water for its own citizens and that the remaining portions of the statute did not offend the dormant Commerce Clause insofar as they allowed a permit to issue for interstate transfers of ground water if the request was "reasonable," "not contrary to the conservation and use of

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[429] *State of Nebraska ex rel. Douglas v. Sporhase*, 305 N.W.2d 614, 713 (Neb. 1981) (Krivosha, C.J., dissenting in part) ("The issue here is . . . whether *a citizen of the State of Nebraska* can be prohibited from using water on land owned by that citizen in *both this state* and in an adjoining state . . .") (emphasis added).

[430] 458 U.S. at 957-58, 960.

[431] *Id.* at 958 n.18. The Court remanded the case to the Supreme Court of Nebraska to determine whether the reciprocity provision was severable from the remainder of the permitting statute. *Id.* at 960.

ground water," and "not otherwise detrimental to the public welfare."[432] But the Court's statements in this regard were specifically tied to the fact that the party seeking to transfer water out-of-state was a citizen of Nebraska: "Obviously, a State that imposes severe withdrawal and use restrictions *on its own citizens* is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."[433]

Unlike *Sporhase*, this is a controversy between two states over one state's efforts to control its sister state's vital access to an interstate stream. As shown above, federal common law and interstate compacts, not state law, govern the parties' respective rights and obligations.[434] Moreover, unlike in dormant Commerce Clause cases, where Congress has not yet exercised its constitutional authority, Congress in this case has twice acted in matters concerning Virginia's access rights in the Potomac River. Congress ratified the Black-Jenkins Award, Clause IV of which forever confirmed and preserved Virginia's right of access to the Potomac River. *See* Mem. Dec. No. 4, at 36-38.[435] In addition, Congress enacted section 181(c) of the Water Resources Development Act of 1976 specifically to avoid any inference that

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[432] *Id.* at 955 ("The State's interest in conservation and preservation of ground water is advanced by the first three conditions . . . for the withdrawal of water for an interstate transfer.").

[433] *Id.* at 955-56 (emphasis added). The Nebraska landowners in *Sporhase* conceded that these provisions were reasonable as applied to them. *Id.* at 957.

[434] *See supra* Argument, Part I(D)(1)-(2).

[435] Because Clause IV of the Black-Jenkins Award referenced Virginia's rights under the Compact of 1785, Congress' adoption of the Award also "operated as an approval of the original compact, and of its continuance in force under the sanction of Congress." *Wharton v. Wise*, 153 U.S. 156, 173 (1894).

Maryland had any stronger claim than Virginia to regulate water withdrawals from the Potomac River.[436]

F. Maryland's Claim that Virginia has no Riparian Right to Withdraw Water and is Dependent on Maryland's "Police Power" Authority for Its Water Supply is Without Merit.

Maryland makes the astonishing argument that, in fact, "neither Virginia nor its 'riparian communities' have any riparian right to withdraw water from the Potomac." Md. Br. at 39. Maryland relies on two Virginia cases and authorities in other states for the proposition that "riparian rights" do not include the right to divert surface water for use other than on riparian land. While Maryland thus implies that it has the right to cut off Virginia's water supply, it volunteers that it "has long sought to accommodate Virginia's need for water." *Id.* at 40. Maryland intimates that Virginia actually *depends* upon Maryland's "police power" authority in order to have any legal right to withdraw water from the Potomac River in the first place.

There are three flaws in Maryland's argument. First, even assuming for the sake of argument that Virginia's domestic law governing riparian rights somehow prevented the diversion of surface water for use other than on riparian land, that law would not apply to Virginia's rights as a state to withdraw water from the Potomac River. As demonstrated in Part I(D)(2) above, the law applied by a State to matters of private controversy involving water rights does not govern that State's right to withdraw water from an interstate stream. Thus, in *Connecticut v. Massachusetts*, the Court held that Connecticut could not prevent Massachusetts'

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[436] 42 U.S.C. § 1962d-11a(c) ("Except as may be provided in the agreement referred to in subsection (a)(2) of this section, ***nothing in this section shall alter any riparian rights or other authority*** of the State of Maryland, or any political subdivision thereof, ***the Commonwealth of Virginia, or any political subdivision thereof,*** or the District of Columbia, or authority of the Corps of Engineers existing on the date of enactment of this section ***relative to the appropriation of water from, or the use of, the Potomac River.***") (emphasis added) [VX 292].

proposed diversion of water from tributaries to the Connecticut River even though the diversion would diminish the quantity of flow available downstream for Connecticut, in violation of the riparian rights doctrine adopted by both States. 282 U.S. at 669-71. The Court explained that "[t]he determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right." *Id.* at 670-71 (*citing Kansas v. Colorado*, 185 U.S. at 146). A state's internal law concerning riparian rights does not carry much weight in controversies between states, not only because of the grave consequences of depriving a state of its essential access to water,[437] but also because every state remains free to alter its internal law of riparian rights.[438]

The second flaw in Maryland's argument is its misconception that Virginia law prevents the use of water other than on land adjoining the waterway. If that were the case, Virginia would

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[437] *E.g., New Jersey v. New York*, 283 U.S. at 342 ("It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war."); *Kansas v. Colorado*, 206 U.S. at 98 (rejecting argument that Kansas' common law of riparian rights should apply to Colorado's use of the Arkansas River because this would "perpetuate a desert condition in portions of Colorado. . . .").

[438] *E.g., Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) ("[T]he states could formulate, and modify, rules of riparian ownership as they saw fit."); *Kansas v. Colorado*, 206 U.S. 46, 86 (1907) (recognizing that the "power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State") (internal quotation and citations omitted); *Shively v. Bowlby*, 152 U.S. 1, 14, 43 (1894) (noting that states are free to determine whether or not to change the common law doctrines of riparian rights).

An identical ruling was made in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) (explaining that "a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise"), although Maryland has creatively edited its quotation of that case to suggest that it stands for an entirely different proposition. Md. Br. at 39.

have a hard time indeed providing water to its citizens. Not surprisingly, there is no such legal impediment. Under Virginia law, "[e]very locality may provide and operate *within or outside its boundaries* water supplies and water production, preparation, distribution and transmission systems, facilities and appurtenances for the purpose of furnishing water for the use of its inhabitants. . . ." Va. Code Ann. § 15.2-2143 (Michie Supp. 2001) (emphasis added).[439] Similarly, Virginia law permits localities to form water authorities that are expressly authorized to construct, acquire and operate water systems whether "within, outside, or partly within and partly outside any one or more of the localities which created the authority. . . ." Va. Code Ann. § 15.2-5114(6) (Michie Supp. 2001).[440]

The two Virginia cases cited by Maryland are not to the contrary. In *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508 (1921), the Supreme Court of Virginia determined that, while a riparian landowner, including a municipality, had no common law right to divert water for use on other than riparian land, the Town of Gordonsville was permitted to demonstrate that its diversion of a non-navigable stream to supply drinking water to the Town had, by prescription, ripened into a vested right such that the Town could seek to enjoin a

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[439] A "locality" means any Virginia county, city or town. Va. Code Ann. § 15.2-102 (Michie 1997) [VX 300].

[440] The Virginia Constitution provides that "it shall be the Commonwealth's policy to protect its . . . waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Va. Const. Art. XI, § 1 (Michie 2001) [VX 293]. "In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands and natural resources of the Commonwealth . . . and the protection of its . . . waters from pollution, impairment or destruction, by agencies of the Commonwealth or by the creation of public authorities. . . ." *Id.* § 2. Pursuant to that authority, the General Assembly has set forth by statute a policy as to waters of the State. *See* Va. Code Ann. §§ 62.1-10 through 62.1-13 (Michie 2001) [VX 305]. Virginia state "waters" are defined to include "all waters, on the surface and under the ground, *wholly or partially within or bordering the Commonwealth* or within its jurisdiction and which affect the public welfare." *Id.* § 62.1-10(a) (emphasis added). This definition clearly encompasses the Potomac River.

diversion by an upstream user. *Id.* at 562-65, 106 S.E. at 515-16. In *Town of Purcellville v. Potts*, 179 Va. 514, 19 S.E.2d 700 (1942), the Court held that a municipality could not divert water from a non-navigable stream to the detriment of a downstream riparian owner unless the municipality acquired the downstream owner's rights by purchase or condemnation. *Id.* at 524-25, 106 S.E.2d 704. In neither case was the municipality prevented from supplying drinking water to its citizens, as Maryland tries to suggest.

The third flaw in Maryland's argument is its failure to link its contention about Virginia's law of riparian rights to any limitations in the Compact of 1785 or Clause IV of the Black-Jenkins Award. The word "riparian" does not even appear in Article VII of the Compact. Rather, that Article provides that the citizens of "each State, respectively, shall have full property in the shores of Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging. . . ."[441] The only limitation was that the exercise of such rights not "obstruct or injure the navigation of the river."[442] While the word "riparian" was used in Clause IV of the Black-Jenkins Award, its use there did not imply any limitation on Virginia's use of the River. Rather, "Virginia is entitled not only to the full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the *full enjoyment* of *her* riparian ownership. . . ."[443] The focus was clearly on Virginia's rights as a State to make full use of the Potomac River ("*full*

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[441] Compact of 1785, art. VII, 1785-86 Md. Laws ch. 1, 1785-86 Va. Acts ch. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823) [VX 1].

[442] *Id.*

[443] Black-Jenkins Award, 1878 Md. Laws ch. 274, 1878 Va. Acts ch. 246, Act of March 3, 1879, ch. 196, 20 Stat. 481, 482 (emphasis added) [VX 2].

enjoyment of *her* riparian ownership"). No limitation on water withdrawal authority was suggested anywhere in the Award or in the opinion accompanying it.

Consistent with the language of the Compact and the arbitration award, Maryland, to our knowledge, has not taken the position that Virginia's rights to withdraw water from the Potomac River were in any way limited by some sort of impediment in Virginia's law of riparian rights. To the contrary, Maryland has frequently acknowledged the "riparian" rights of Virginia and its localities to withdraw water from the Potomac River. It did so formally in 1978 as a signatory to the LFAA, stating "the parties to this Agreement recognize that other *riparian* interests, such as communities in Virginia, may in the future desire to withdraw and use water" from the Potomac River.[444] Maryland's assistant attorney general likewise testified before Congress in 1976 that: "This agreement and the bill before you today in no way would affect or detract or take away any riparian rights of the State of Virginia. We recognize that the State of Virginia has riparian rights, and those rights are equivalent or equal to the riparian rights of Maryland communities, and there is no intent to take anything away from the state of Virginia."[445] *See also* Deposition of Sachs at 204-05 (explaining that his 1977 public address referring to Virginia's "riparian rights" as having "originated in treaties and agreements established before we were a country" referred to rights established by the Compact of 1785). More recently, Maryland's Department of Environment stated in a position paper filed with the Maryland General Assembly: "Virginia and West Virginia have full riparian rights to the use of the Potomac River. This was formally

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[444] LFAA, *supra* note 120, at 2 (emphasis added) [VX 201].

[445] Senate Hearings, Omnibus Water Resources Development Act, *supra* note 54, at 2102 (Statement of Warren Rich) [VX 266].

established in the Compact of 1785 and upheld by the Supreme Court."[446] Similarly, the Director of MDE's Water Management Administration wrote to Maryland's State Delegate Shriver in 1997 that: "As a riparian to the Potomac River and its tributaries, Virginia has the right to use the water and has done so for hundreds of years."[447]

II.
MARYLAND'S AFFIRMATIVE DEFENSE OF PRESCRIPTION AND ACQUIESCENCE SHOULD BE REJECTED

Of the eight affirmative defenses originally pleaded in its Answer and Amended Answer, Maryland has elected to pursue only its eighth defense of prescription and acquiescence.[448] This is Maryland's second bite at the apple, since the Special Master already rejected that defense this past July. Mem. Dec. No. 4, at 39-42. None of the additional evidence that Maryland marshals in support of this defense is sufficient, either legally or factually, to show that Virginia has lost any of her Potomac River access rights.

A. Maryland's Defense of Prescription and Acquiescence Fails as a Matter of Law.

Maryland's defense fails at the outset, as a matter of law, for three independent reasons.

1. The Defense is Inapplicable in Compact Cases.

When an interstate compact is approved by Congress, as in this case, the compact is transformed into federal law binding on the signatory states under the Supremacy Clause. Once that happens, no court can order relief inconsistent with its terms, no state acting alone can alter

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[446] Position Statement, Maryland Department of Environment (2/24/98), *supra* note 240, at 2 [VX 228].

[447] Letter from Hearn to Del. Shriver dated 6/16/97 [FCWA/MDE Joint Ex. 128] [VX 215].

[448] Case Management Order No. 11 directed Maryland to file its brief on all remaining affirmative defenses by no later than Friday, December 7, 2001.

the compact, and the signatory states acting together cannot change or modify it without the consent of Congress. The Court's recent treatment of this rule in *New Jersey v. New York* warrants quotation at length:

> As we explained long ago, once a compact between States has been approved, "it settles the line or original right; it is ***the law of the case binding on the states and its citizens***, as fully as if it had been never contested." *Rhode Island v. Massachusetts*, 12 Pet. 657, 727 (1838). Indeed, congressional consent "transforms an interstate compact within [the Compact] Clause into ***a law of the United States***," *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *accord*, *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). Just as if a court were addressing a federal statute, then, the "***first and last order of business***" of a court addressing an approved interstate compact "is interpreting the compact." *Texas*, 462 U.S., at 567 - 568. "***[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms***," *id.*, at 564, ***no matter what the equities of the circumstances might otherwise invite***. See *Arizona v. California*, 373 U.S. 546, 565-566 (1963) ("[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."); *Washington v. Oregon*, 211 U.S. 127, 135 (1908) (noting that ***Congress had established the boundary*** between Washington and Oregon in the middle of the north channel, and that "***[t]he courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel," even though changes in the waterway over the course of time seemed to indicate the equity of altering the boundary line***)."

523 U.S. 767, 810-11 (1998) (emphasis added).

In short, a state's acts of prescription or acquiescence cannot alter a compact constituting a law of the United States. Indeed, we have been unable to find *any* case in which rights protected by a federally-approved compact were subsequently found to have been lost or modified, without further Congressional action, through the vehicle of that equitable defense.

2. The Period of Time Upon Which the Defense is Based Is Too Short.

Assuming for the sake of argument that the defense could operate to alter a Congressionally-approved compact, the period of time upon which Maryland relies is far too

short to be legally viable. The defense applies only if the acts of prescription and acquiescence occur over a "substantial" period of time. *New Jersey v. New York*, 523 U.S. at 786. Although the Court has declined to establish a minimum period, it observed most recently in *New Jersey v. New York* that one prior case had found a period as short as 60 years to be sufficient. 523 U.S. at 790 (*citing Michigan v. Wisconsin*, 270 U.S. 395 (1926)).[449]

In fact, most of the cases have involved significantly longer periods, usually 100 years or more.[450] In one case cited by Maryland, *Indiana v. Kentucky*, 136 U.S. 479 (1890), the delay in bringing the claim was in excess of 70 years. *Id.* at 509-10. The Court emphasized that the delay was so long that the essential facts in the case "have long since passed beyond the memory of man" and "the very grandchildren of men then living are now hoary with age." *Id.* at 517. Whether prescription and acquiescence has occurred for more years than a human lifetime has often been the gauge by which the necessary period has been measured.[451] In this case, by

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[449] Although 64 years was therefore "enough to open the door to litigation of the relevant period," the Court went on to find New York's evidence "too slight to support any finding of prescription." *Id.* at 790.

[450] *See Georgia v. South Carolina*, 497 U.S. 376, 392-93 (1990) (finding prescription based upon South Carolina's almost-uninterrupted control of an island from 1813 to the 1950s); *California v. Nevada*, 447 U.S. 125, 126 (1980) (fixing boundary to which both states "acquiesced for the better part of a century"); *Ohio v. Kentucky*, 410 U.S. 641, 645-52 (1973) (finding that Ohio had acquiesced for 150 years in the boundary with Kentucky); *Arkansas v. Tennessee*, 310 U.S. 563, 567-72 (1940) (applying the doctrine where the evidence showed unequivocal dominion by Tennessee for 115 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (involving over 90 years of acquiescence by Mississippi).

[451] *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 569 (1940) ("No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.") (*quoting Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1876)); *Maryland v. West Virginia*, 217 U.S. 1, 42 (1910) (same); *Virginia v. Tennessee*, 148

(continued...)

contrast, the Maryland official who knows the most about Maryland's dealings with Virginia in the 1970s is still employed by MDE and gave a deposition in this case,[452] and an assistant attorney general for Virginia whose letters Maryland relies upon as evidence of acquiescence, Md. Br. at 65, remains employed by the Commonwealth and serves as one of her attorneys in this case.

This case should be treated like others in which the period of time has been found to be too short. For instance, the Special Master in *Kansas v. Nebraska*, No. 126, Orig., recently concluded that Kansas' delay in filing an action to enforce its rights under the Republican River Compact for "a period of *thirty-nine years* is not sufficient to constitute consent or acquiescence" to Nebraska's overuse of water in violation of the compact.[453] The Special Master explained:

> No case cited by Nebraska in which the Court has found a valid acquiescence defense involves a time lapse of fewer than forty years, which is beyond the longest possible delay in this case, and most of the cases cited have a lapse of 100 or more years. The time period here is not sufficiently long to constitute consent/acquiescence, especially in view of the public's overriding interest in having the water allocation system of the Compact complied with.[454]

U.S. 503, 524 (18932) (noting the delay was "over eighty-five years, embracing nearly the lives of three generations"). This concept dates back at least to Blackstone. *See* 2 William Blackstone, *Commentaries on the Laws of England* 265 (1766) (Univ. of Chicago Press, 1979) ("For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estates commenced within the remembrance of man.").

[452] Sachs Dep. at 4 (still employed by MDE), 29-30 (was Maryland's senior staff person in charge), 56 (most knowledgeable about Maryland's participation in the discussions and negotiations leading up to the LFAA) [VX 139].

[453] Special Master's Mem. Dec. No. 3, at 16, *Kansas v. Nebraska*, No. 126, Orig. (Oct. 19, 2001) (emphasis added).

[454] *Id.* at 17.

Similarly, the Court in *Texas v. New Mexico*, 482 U.S. 124 (1987), found that a 24-year delay did not bar Texas from asserting a claim against New Mexico for breach of the Pecos River Compact. The Court stated: "There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact. . . ." *Id.* at 128.[455] Against the weight of these authorities, Maryland's suggestion, at page 84 of its brief, that the Court should apply the 20-year limitations period applicable in private cases of adverse possession, is obviously erroneous and should be rejected.[456]

Maryland's particular emphasis on permits issued in the past few decades also ignores that the relevant period here is the past 217 years, dating back to the original Compact of 1785 -- not simply the past 20, 30 or even 40 years. Indeed, the Court in *New Jersey v. Delaware*, 291 U.S. 361 (1934), rejected the doctrine of prescription entirely, explaining that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain." *Id.* at 376-77.[457] The same principle applies here. As Senator Mathias and Congressman Beall remarked about

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[455] *See also Oklahoma v. Texas*, 272 U.S. 21, 47 (1926) (stating that the time period claimed for prescriptive activity, 24-years, was "a much shorter period than that involved in any of the cases cited" by the parties).

[456] Contrary to Maryland's suggestion, Black and Jenkins did not rely on a mere 20-year period of prescriptive activity in finding that Virginia had acquired title to the low-water mark of the Potomac River. Rather, they found that Virginia's claim was supported by her exclusive use of the south bank of the Potomac River "from the earliest period of her history. . . ." Board of Arbitrators, *supra* note 324, at 15 [VX 64].

[457] *See also Ohio v. Kentucky*, 410 U.S. 641, 651 n.10 (1973) (noting that it is not proper to rely on principles of prescription and acquiescence "when the States' boundary dispute has been open, continuous and of long standing.").

§ 181 of the Water Resources Development Act of 1976, "[t]he fact that Maryland and Virginia have for literally hundreds of years feuded over the use and control of the Potomac River makes the recent accord by the two states all the more significant."[458]

Even if a long history of feuding did not preclude the doctrine's applicability, two additional considerations would warrant requiring a very long period before rights under an interstate compact could be lost. First, where a course of conduct had been established for so many years *prior* to the beginning of allegedly prescriptive acts, the level of proof should be correspondingly greater, and the period of time longer, to show that those later acts have operated to change the established legal order. *E.g.*, *Georgia v. South Carolina*, 497 U.S. 376, 388-92 (1990) (holding that the fact that Georgia exercised exclusive dominion and control over the Barnwell Islands since 1955 did not give it title to those islands by prescription where South Carolina had previously exercised dominion and control over the same islands from 1813 to 1955).

Second, the required period should be longer when there has been no case or controversy that could have given rise previously to an original action filing. In this case, Maryland did not seek to block Virginia's access to the Potomac River until 1997. Prior to that time, there was no case or controversy that would have justified the extraordinary invocation of this Court's exclusive, original jurisdiction to resolve the questions now presented. *E.g.*, *New York v. New Jersey*, 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence."). Allowing prescription to operate over a comparatively short period

[458] Letter from Mathias *et al.* to Gravel dated 9/30/76 [MD-MDE-22225-26] [VX 169].

would, in these circumstances, impose a hair-trigger on original action filings, since no State would wish to risk losing rights protected by compact. Such a result would run contrary to "this Court's often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement.'"[459]

3. Only the Virginia General Assembly Could Waive or Suspend Virginia's Rights Under Interstate Compacts with Maryland, and It Has Not Done So.

Maryland's defense is legally foreclosed for a third reason. Virtually all of the evidence upon which it is based involves actions by Virginia citizens, Virginia localities or Virginia state agencies. Whether one applies Virginia state law or looks to this Court's prior cases, none of those persons or entities had the authority to waive or relinquish rights belonging to the Commonwealth under her interstate compacts with Maryland, and which are affirmatively set forth in the Virginia Code.[460]

As a matter of Virginia law, no branch of Virginia state government other than the General Assembly has the power to suspend a statute or to waive Virginia's rights under an interstate compact. Article IV, § 1, of the Virginia Constitution vests the legislative power of the Commonwealth in the General Assembly.[461] Article I, § 5, provides that "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct. . . ."[462] Most importantly to this case, Article I, § 7 provides "[t]hat all power of

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[459] *Arizona v. California*, 373 U.S. 546, 564 (1963) (*quoting Colorado v. Kansas*, 320 U.S. 383, 392 (1943), and *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945)).

[460] Va. Code Ann. § 7.1-7 (Michie 1999) [VX 54].

[461] Va. Const. Art. IV, § 1 (Michie 2001) [VX 293].

[462] Va. Const. Art. I, § 5 (Michie 2001) [VX 293]; *see also id.* Art. III, § 1 (Michie 2001) ("The legislative, executive, and judicial departments shall be separate and distinct. . . .") [VX 293].

suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."[463] This section was contained in the original Virginia Declaration of Rights of 1776 and remains unchanged in the present Virginia Constitution of 1971.[464]

Under these constitutional provisions, particularly Article I, § 7, "the power to suspend statutes is vested *exclusively* in the General Assembly and must be exercised by statute or by joint resolution of that body."[465] The Governor, for instance, is without power to "suspend[] the operation of a duly adopted statute in the absence of some other statute authorizing [him] to do so."[466] Indeed, "even the General Assembly itself cannot suspend a statute's operation by *inaction*, but must take *affirmative* action to do so."[467] "To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice."[468]

Because the General Assembly ratified the Compact of 1785 and the Black-Jenkins Award of 1877, only the General Assembly could suspend the effect of those compacts or waive Virginia's rights under them, and affirmative action would be needed to do so. In this case,

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[463] Va. Const. Art. I, § 7 (Michie 2001) [VX 293].

[464] 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 91 (1974) [VX 278].

[465] 1991 Report of the Va. Att'y Gen. 41, 44 (emphasis added) [VX 314]; *see also* 1978-79 Report of the Va. Att'y Gen. 110, 112 ("It is well settled ... that the power to amend and repeal statutes is vested exclusively in the legislature.") [VX 312].

[466] 1991 Report of the Va. Att'y Gen. 41, 44 [VX 314]; *see also* Va. Code Ann. § 2.2-114 (Michie 2001) ("Subject to the ultimate authority of the General Assembly to prescribe the policies of the Commonwealth and within the framework of policy established by the General Assembly, all communications shall be at the policy direction of the Governor.") [VX 298].

[467] 1991 Report of the Va. Att'y Gen. 41, 44 (emphasis added) [VX 314].

[468] 1981-82 Report of the Va. Att'y Gen. 185, 186 [VX 313].

however, the General Assembly expressly *reaffirmed* Virginia's compact rights in the Potomac River Riparian Rights Act of 1979.[469]

Since only the General Assembly would be empowered to waive rights under an interstate compact, obviously no Virginia locality would have the power to do so. In fact, Virginia has long followed the "Dillon Rule" of strict construction which strictly limits a locality's powers to those expressly granted by the General Assembly or necessarily or fairly implied in such a grant.[470] There is nothing in the Code of Virginia that would give any locality the power, express or implied, to waive the Commonwealth's rights under its compacts with Maryland.

The Court has also observed that a State's political subdivisions cannot speak on behalf of a State with respect to that State's sovereign rights. For instance, in *New Jersey v. New York*, 345 U.S. 369 (1953), the Court refused to permit the City of Philadelphia to intervene in a water rights dispute to which the Commonwealth of Pennsylvania was already a party, stating "[i]f we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.*

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[469] 1979 Va. Acts ch. 307, codified at Va. Code Ann. §§ 62.1-44.113 through 62.1-44.116 (Michie 1998) [VX 307].

[470] *W.M. Schlosser Co. v. Fairfax County Sch. Bd.*, 980 F.2d 253, 255 (4th Cir. 1992) ("According to the Dillon Rule, local governing bodies such as counties, municipal corporations, and school boards possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable. The Rule is strictly construed and strictly enforced by the Virginia Supreme Court and the court does not liberally recognize governmental powers by implication. Significantly, if there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.") (collecting cases; citations and quotations omitted); *County Bd. of Arlington v. Brown*, 229 Va. 341, 347, 329 S.E.2d 468, 471-72 (1985) (holding that the power to lease realty was not implied from the county's power to sell or convey realty).

at 373; *accord* Mem. Dec. No. 1, at 3-4 ("To the extent Loudoun County and [Loudoun County Sanitation] Authority have interests that diverge from those of any other subdivisions, departments, agencies, or constituencies that the Attorney General of Virginia represents, those interests involve conflicts internal to Virginia and are beyond the scope of this litigation and the reach of these proceedings. It is the Commonwealth of Virginia that is a party to these proceedings and it and its political subdivisions must speak with one voice in this litigation.").

Similarly, individual government agencies and officials cannot by their own conduct or statements cause the Government to lose its rights. "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40 (1947).[471]

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[471] *See also Heckler v. Community Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 276 n.4 (1982) ("California does not contend that, having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Such an argument is foreclosed by *United States v. California*, 332 U.S. 19, 39-40 (1947)); *United States v. City and County of San Francisco*, 310 U.S. 16, 31-32 (1940) (holding that the Government's acquiescence from 1913 to 1935 in allowing the sale of electric power in violation of a federal statute did not bar the Government from enforcing the prohibition thereafter, stating it was "doubtful" that the Interior Department did anything "more than merely to tolerate" the prior practice "as a temporary expedient"); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.") (collecting cases).

An individual Virginia citizen is likewise unable to cause the Commonwealth to lose rights protected under interstate compact. An interstate compact is "binding" on both a state and "its citizens." *New Jersey v. New York*, 523 U.S. at 810. Because a State is "deemed to represent all its citizens," no individual citizen can question either "the making of the contract by the two states" or "the obligations that the contract imposes upon his state. . . ." *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930). That principle "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects. . . ." *New Jersey v. New York*, 345 U.S. at 373.[472]

In short, because none of Maryland's evidence demonstrates that the Virginia General Assembly has ever suspended or affirmatively waived Virginia's compact rights, Maryland's defense must be rejected as a matter of law.

B. Maryland's Evidence of Prescription and Acquiescence is Factually Inadequate.

Maryland has offered only three categories of evidence that actually bear on the defense of prescription and acquiescence: the taxation of structures extending from the Virginia shore; the issuance of Maryland permits to withdraw water from the River or to build improvements from the Virginia shore; and several prior opinions of the Attorney General of Virginia. Even if

[472] Even when citizens have sought to enforce their own federally protected rights, the Court has held that their ability to do so was not impaired by the fact that they had previously applied for state permits or other state benefits. *E.g.*, *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 456-57 (1988) (holding that plaintiff was not estopped to challenge the constitutionality of a North Dakota law permitting school systems to charge for bus service, notwithstanding that she had signed a contract agreeing to the charge and had paid it after the suit was filed); *City of Newark v. Central R. Co.*, 267 U.S. 377, 385 (1925) (holding that a railroad company was not barred from challenging a New Jersey requirement that it obtain a state permit to reconstruct a railway crossing, notwithstanding that the company had applied for the state permit on three prior occasions).

the defense were legally available, none of that evidence is strong enough for Maryland to carry her heavy burden of proof.[473]

1. Maryland's Argument Based on Real Estate Tax Assessments Backfires.

Maryland places enormous weight on the fact that it has imposed real property taxes on a handful of establishments accessible from piers on the Virginia shore of the Potomac River. This argument completely backfires. Maryland currently taxes only three such establishments:

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[473] In boundary controversies, the Court has required the party maintaining the defense to prove prescription and acquiescence by the "preponderance of the evidence" standard. *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991). Although the Court has not analyzed the basis for requiring that standard, and has not explored whether a higher standard might be warranted in certain cases, it emphasized in *New Jersey v. New York* that it "is essential to appreciate the extent of this burden that a claimant must shoulder." 523 U.S. at 788; *accord id.* at 829 (Scalia, J., dissenting) (stating that the doctrine of prescription and acquiescence "justifiably demands a very high burden of proof.")

Because Maryland fails to satisfy the "preponderance of evidence" standard, the Court need not reach the question of whether a "clear and convincing" standard should be applied instead. However, that heightened standard would be more appropriate for cases like this one (assuming that a federally-approved compact can be altered by prescription), where one state contends that the other state's acquiescence amounts to *abandonment* of rights protected by interstate compact. By analogy, for example, both Virginia and Maryland require a party asserting that an easement has been lost through prescription and abandonment to establish the necessary facts by "clear and unequivocal" evidence. *Lindsey v. Clark*, 193 Va. 522, 525-26, 69 S.E.2d 342, 344 (1952) (a party claiming abandonment of an easement must show, by "*clear and unequivocal evidence*," the nonuse of an easement coupled with acts which evidence an intent to abandon or "an adverse user by the owner of the servient estate, acquiesced in by the owner of the dominant estate...") (emphasis added); *Pizzarelle v. Dempsey*, 259 Va. 521, 528, 526 S.E.2d 260, 264 (2000) (same); *Shuggars v. Brake*, 248 Md. 38, 46, 234 A.2d 752, 758 (1967) ("An easement may not be lost unless there is some act *clearly and unequivocally* indicating an intention to abandon it, and mere non-user is not enough.") (emphasis added). The same rule is commonplace in other states. 23 Am. Jur. 2d *Easements and Licenses* § 112 (1996) ("The acts claimed to constitute the abandonment must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement. Thus, the abandonment of the easement must involve clear, unequivocal and decisive acts by the owner of the dominant estate showing a present intent to abandon. The conduct of the owner must be conclusive as to show a clear intent to forego all future conforming uses of the easement."). It would certainly be anomalous to require a *lower* burden of proof to establish the loss of interstate compact rights than to establish the loss of private property rights protected by an easement.

"Jamaica Joe's," a crab house and tavern in Charles County, Maryland, offshore of Fairview Beach, King George County, Virginia;[474] "Flanagans," formerly known as "Reno's" and "Riverboat on the Potomac," a restaurant and tavern in Charles County, Maryland, offshore of the Town of Colonial Beach, in Westmoreland County, Virginia;[475] and "Coles Point" tavern, a restaurant and bar built in the 1940s in St. Mary's County, Maryland, offshore of Westmoreland County, Virginia.[476] A fourth offshore restaurant and bar that Maryland previously taxed, Belvedere Beach Pier, was torn down in 1972.[477]

As Maryland's supporting declarations demonstrate, these establishments experienced their heyday between 1949 and 1958, when slot machines were legal in St. Mary's County and Charles County, Maryland, but remained illegal in Virginia.[478] To protect their gambling business, the proprietors went to great lengths to show that their operations were *not* in Virginia. The deeds for the offshore properties were recorded in Maryland.[479] At least two of the proprietors cut gaps in their piers to show that the offshore property was not part of Virginia.[480]

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[474] Md. Ex. F ¶ 8; Md. Ex. G ¶ 4.

[475] Md. Ex. F ¶ 15.

[476] Ex. H ¶ 3.

[477] Md. Ex. F ¶ 5.

[478] Md. Ex. W ¶¶ 3-23; Md. Ex. C ¶ 8.

[479] Md. Ex. W ¶¶ 24-32 & Exs. 17-24.

[480] *See* Md. Ex. W ¶ 42 & Ex. 33 (photograph showing Little Reno's and stating in caption that "[t]he pier was totally sawn-thru [sic] at the exact state boundary line, thus permitting easy access of Virginia patrons to Maryland slot machines."); Md. Ex. S ¶ 3 ("It was well known that slot machines were located at Cole's Point Tavern because such slots were not legal in Virginia, but were in Saint Mary's County. Indeed, in an effort to sever any connection to Virginia, there was a gap in the walkway of approximately one foot that physically separated the Cole's Point Tavern property from the Commonwealth of Virginia. The walkway connected

(continued...)

Another placed a large sign at the boundary line to show where the customer was leaving the Commonwealth and entering the State of Maryland.[481]

Westmoreland County, Virginia, taxes the piers leading to Flanagan's and Coles Point Tavern, but does not tax the restaurants.[482] King George County, Virginia, does not tax the restaurant at Jamaica Joe's, and apparently does not tax the pier leading out to it.[483]

Maryland emphasizes that it imposes real property taxes on all three restaurant properties (and heavily regulates the sale of liquor and gaming at all three, and off-track betting at Flanagan's). But Maryland fails to demonstrate how its taxation of these unique properties supports the proposition that Virginians have lost the right to build improvements from the Virginia shore without Maryland's prior permission. Ironically, these structures were built before Maryland had a permitting system, so Maryland required no permit for their construction. More importantly, these properties are the exception that proves the rule. The owners of these properties held deeds granting them title in the riverbed on the Maryland side of the boundary.[484]

By contrast, Maryland has ignored that there are in excess of *335* piers, docks and boatramps extending into the Potomac River from the Virginia shore, beyond the Virginia/Maryland line, that are fully assessed and taxed by Virginia's localities, and that have never been

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to Cole's Point Tavern ended near the beach and then the walkway started again after about a foot. I understood that one side of the gap was Maryland and that the other side of the gap was Virginia.").

[481] Md. Ex. N ¶ 3 (describing "Welcome to Maryland" and "Welcome to Virginia" signs on either side of the doorway at "Riverboat on the Potomac").

[482] Declaration of Carol B. Gawen ¶ 4 [VX 127].

[483] Declaration of Faye W. Lumpkin ¶ 3 [VX 131].

[484] Md. Ex. W ¶¶ 24-32 & Exs. 17-24.

assessed or taxed by Maryland or its localities.[485] Thus, to the extent that the States' respective taxation of improvements extending from the Virginia shore is relevant, the evidence completely undercuts Maryland's case, just as it undercut Kentucky's claim of prescription and acquiescence in *Illinois v. Kentucky*, 500 U.S. 380 (1991). The Court there found Kentucky's evidence inadequate to prove that it had acquired sovereignty over the submerged lands on the Illinois side of the Ohio River because Kentucky had taxed only three of the 15 structures that extended from the Illinois shore.[486] Maryland fares much worse by comparison to Kentucky on these statistics, and its argument based on prescription and acquiescence must likewise fail.

2. Maryland's Argument Based on Prior Virginia Permit Applications Fails.

Most of Maryland's evidence of prescription and acquiescence involves various types of water appropriation and v[illegible]erway construction permits that it has issued to Virginia users over the past few decades. Although this evidence does not show that Virginia has relinquished any of her compact rights, for the reasons stated in Part II(A) above, this evidence should also be rejected as factually inadequate.

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[485] Declaration of Scott Mayausky ¶¶ 2-3 (25 in Stafford County) [VX 132]; Gawen Decl. ¶¶ 2-3 (204 in Westmoreland County) [VX 127]; Declaration of Todd Thomas ¶¶ 2-3 (59 in Northumberland County) [VX 135]; Lumpkin Decl. ¶¶ 2-3 (50 in King George County) [VX 131]. Maryland produced no evidence that it had ever taxed these properties in response to Virginia's Interrogatory No. 37 [VX 142] and Document Request Nos. 18-19 [VX 143].

[486] "According to Kentucky's view of the boundary, for example, any permanent structure extending out over the water from the river's northern bank would be within Kentucky's territory, and subject to its taxing power, one of the primary indicia of sovereignty. The record in this case, however, shows that Kentucky has imposed a property tax on only 3 of the 15 structures that extend out, into, or over the water from the Illinois shoreline. Of the three affected taxpayers, one who received a Kentucky tax bill for property extending south into the river was also taxed on the same structure by Illinois, and another paid the Kentucky bill only under protest, 'claiming that the property [taxed was] within the State of Illinois.' Report of Special Master 37. The remaining 12 structures extending south into the river from Illinois have never been taxed by Kentucky." 500 U.S. at 385.

(a) Maryland is Estopped From Contending that Virginia Has Lost the Right to Contest its Permitting Authority.

Maryland's previous litigation positions should estop it from claiming that Virginia has lost its right to challenge Maryland's permitting system. Maryland has twice taken the position in this Court that there will be no "case or controversy" until a Virginia citizen is actually denied access to the Potomac River, and that whether Virginia's compact rights are violated depends first on the denial of a permit by Maryland.[487] Maryland specifically stated in opposing Virginia's motion for leave to file the Bill of Complaint:

> [D]espite Virginia's assertion that the pending Maryland administrative proceeding is "not an alternative forum to resolve Virginia's claim" with respect to water appropriation, Br. at 29, ***that claim would properly be the subject of a future administrative proceeding in the unlikely event that a Virginia entity is ever denied an appropriation permit***. As with the pending waterway construction litigation, ***Virginia's Compact claim would have to be decided in any such future Maryland administrative litigation if a waterway appropriation permit request is to be denied***.[488]

As Maryland put it most recently:

> ***Given that Maryland has never denied a Virginia user a water appropriation permit***, Virginia is simply unable to point to any "actual or threatened interference" with respect to FCWA's use of the Potomac, that justifies "enjoin[ing] Maryland from requiring a permit from the FCWA, or from any other local Virginia government or citizen, as a condition of accessing the Potomac River."
>
> . . .

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[487] *See* Maryland's Brief in Opposition to Motion for Leave to File Bill of Complaint at 7, 15-16; State of Maryland, Reply to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness at 5, 12 (filed 6/13/01).

[488] Brief in Opposition to Motion for Leave to File Bill at 15 (emphasis added).

> Indeed, with the sole exception of the waterway intake pipe dispute, Virginia's Complaint acknowledges that "Virginia and Maryland enjoyed a period of cooperation concerning the use of the Potomac River." Complaint ¶ 11. Virginians have for years applied for and obtained Maryland permits to use the bed and waters of the Potomac, and ***access had never been denied prior to the dispute between Maryland and the FCWA.***[489]

Having taken the position that previous permit submissions by Virginia applicants would not prejudice Virginia's ability to challenge Maryland's permitting authority should a controversy ever arise, Maryland should not be allowed to approbate and reprobate by now asserting exactly the opposite argument.

Maryland should also be estopped based on the position taken by the Maryland Department of Environment in its recently concluded litigation with the FCWA. As set forth below, Maryland never contended in that proceeding that the FCWA (or Virginia, for that matter) had waived or relinquished any rights under the Compact of 1785 or its progeny, whether through prescription or any other doctrine.

Virginia's Interrogatory No. 25 in this case requested Maryland to identify all instances in which it had contended, before it responded to Virginia's original action filing in April 2000, that Virginia had in any way relinquished its right to contest Maryland's permitting authority. In response, Maryland stated:

> Maryland raised these issues in the Administrative Case, where MDE contended that the Authority's Compact arguments were defeated for a number of reasons, including the fact that "[t]he [Maryland] Department [of the Environment] has reviewed dozens of applications for waterway construction and appropriation projects from Virginia entities" and that, "[u]ntil now, none of these Virginia applicants has ever contested Maryland's jurisdiction over the Potomac." MDE Pre-Hearing Memorandum,

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[489] Reply to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness at 5-6, 12 (citations omitted, emphasis added).

> at 11 n.9 (Oct. 21, 1998); MDE's Response to the Authority's Pre-Hearing Brief, at 11 n.12 (Oct. 30, 1998); MDE Argument, at 21 n.7 (Jan. 28, 2000).[490]

Maryland's answer was incorrect. A review of the three pleadings cited will show that, while Maryland certainly mentioned in footnotes that prior Virginia applicants had obtained water appropriation and construction permits, it never claimed that this fact established any sort of affirmative defense to the FCWA's compact claims. To the contrary, Maryland used those prior permits to show that it had been *respecting* Virginia's compact rights.

In the first pleading cited, Maryland offered the fact of prior Virginia permit applications simply to show that "Maryland has long recognized that Virginians hold riparian rights in the Potomac River."[491] Maryland argued that its prior regulation of those rights "in no way abrogates the Compact."[492]

In the second pleading cited, Maryland stated in a footnote: "It is important to note that Fairfax County has not been deprived of its riparian rights. It received a waterway construction permit to construct its existing intake in 1982. In addition, it has been issued several water appropriation permits over the past twenty years allowing it to withdraw water from the Potomac."[493]

In the third pleading cited, Maryland stated in its written "Argument" before the ALJ:

> Maryland has long recognized that Virginians hold riparian rights in the Potomac River. The Department itself has issued numerous

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[490] Defendant's Answer to Interrogatory No. 25 [VX 142].

[491] MDE Pre-Hearing Memorandum at 11 & n.9 (Oct. 21, 1998) [VX 236].

[492] *Id.*

[493] MDE's Response to the Authority's Pre-Hearing Brief, at 11 n.12 (Oct. 30, 1998) [VX 237].

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> permits to Virginia applicants -- including Fairfax County -- enabling them to withdraw water from the Potomac River and undertake waterway construction within the bed of the river. [n.7]
>
> [n.7] The Department has reviewed dozens of applications for waterway construction and appropriation projects from Virginia entities. Until now, none of these Virginia applicants has ever contested Maryland's jurisdiction over the Potomac.[494]

None of Maryland's pleadings filed in the administrative case included the argument that prior applications by the FCWA or any other Virginia applicant established prescription and acquiescence, or constituted any other type of waiver or relinquishment of any rights. Nor did Maryland include any such statement as a proposed finding of law in its submissions to the ALJ.[495] Maryland's citation in its administrative pleading to prior applications by the FCWA and other Virginia applicants was used to show that Virginia's access rights had been *recognized* by Maryland.[496] Maryland's defense of prescription and acquiescence, by contrast, represents a complete about-face from its earlier representations both to this Court and to the Maryland ALJ.

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[494] Maryland Department of Environment, Argument, at 21 & n.7 (Jan. 28, 2000) [VX 245].

[495] Maryland Department of Environment's Proposed Findings of Fact and Conclusions of Law, at 17-19 (Jan. 28, 2000) [VX 244].

[496] Maryland made that point even more clearly in a brief it filed December 22, 1998:

> The issue of whether Fairfax County has the absolute right to construct the intake under the Compact of 1785 has already been briefed by the parties. Fairfax County now adds to their argument by claiming that the Department's consideration of the environmental impacts associated with the intake constitute a "frontal assault on the Compact." *Suffice it to say, Fairfax County is already exercising its riparian rights under the Compact*; it was issued a waterway construction permit for the existing intake in 1977 and had been withdrawing Potomac River water since 1982. *To conclude that the Department is carrying out a "frontal assault" on the Compact is demonstrably absurd.*

(continued...)

Whether a State should be estopped from assuming a legal position inconsistent with a prior legal position is an equitable question committed to the trial court's sound discretion. *New Hampshire v. Maine*, 121 S. Ct. 1808, 1815 (2001). Unlike New Hampshire in its recent suit against Maine, Maryland did not actually prevail in an earlier proceeding based on an inconsistent position.[497] Nonetheless, Maryland's previous positions are simply irreconcilable with its present claim of prescription and acquiescence. Moreover, unlike New Hampshire, Maryland attempts to maintain a flatly inconsistent position, simultaneously, in the same proceeding. *See* Defendant's Answer to Interrogatory No. 27 [VX 142]. That is precisely the type of "playing 'fast and loose with the courts'" that the doctrine of judicial estoppel is intended to prevent. 121 S. Ct. at 1815 (citation omitted). Application of that doctrine here is warranted.

Even if the Court were to find that Maryland's prior litigation positions do not rise to the level of an independent judicial estoppel that technically bars its current argument, those prior positions are certainly evidence that Maryland did not think, as recently as 1998, that Virginia had lost rights protected by the Compact of 1785 and the Black-Jenkins Award. Maryland's prior representations can also be considered in weighing the overall equities of Maryland's defense. *See infra* Argument, Part II(C).

Maryland Department of Environment's Response to Fairfax County Water Authority's Motion for Summary Disposition, at 20 (Dec. 22, 1998) (citation omitted) (emphasis added) [VX 241].

[497] While the circumstances under which judicial estoppel may be invoked are "probably not reducible to any general formulation of principle," the Court in *New Hampshire v. Maine* observed that the considerations could include: whether the party's later position was "clearly inconsistent" with its earlier position; whether the party succeeded in persuading an earlier court to adopt its first position, such that it would create an appearance that either the first or second court was misled; and whether the party asserting the inconsistent position would derive an unfair advantage over, or impose an unfair detriment to, the opposing party. 121 S. Ct. at 1815. The Court emphasized that, "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.*

(b) Maryland's Argument Based on its Water Appropriation Permitting Statute Fails.

Maryland makes much of the fact that its water appropriation and waterway construction permitting statute was first enacted in 1933. Md. Br. at 69; 1933 Md. Laws ch. 526. But Maryland misstates the historical record when it suggests that it has regulated Virginia's use of the River since 1933. Md. Br. at 69.

(1) Maryland's 1933 Permitting Statute Was Not Amended to Apply Facially to Virginia Until 1973.

As originally enacted, Maryland's 1933 statute did not apply to Virginia or its municipalities. Rather, it made it unlawful for "*the State* or any agency thereof" and any "county, municipality, or other political subdivision *of the State*," to appropriate waters without a permit, or to construct waterway improvements without a permit. 1933 Md. Laws ch. 526 §§ 4, 5 (emphasis added) [VX 318]. These references obviously meant "Maryland" and its political subdivision, not Virginia or its political subdivisions. The statutory references to "the State" were kept in both the water appropriation and waterway construction sections until 1973, when a recodification changed the language in both sections to the more encompassing term "person." *See* 1973 Md. Laws ch. 4 §§ 8-802(A), 8-803(A) [VX 323].

It also bears mention that the water appropriation provision of the 1933 Act exempted several uses from the permitting requirement: any uses in existence prior to 1934; "the use of water for domestic and farming purposes;" and "the use of water for an approved water supply of any municipality." 1933 Md. Laws ch. 526 § 4.[498] These exemptions were retained until the same 1973 amendments mentioned above, when the language was altered to exempt "use of

[498] The waterway construction permit requirement was similarly inapplicable to "any dam or obstruction which is ten feet or less in height" or "any reservoir with a storage capacity of less than one million gallons." 1933 Md. Laws ch. 526 § 5 [VX 318].

water for domestic and farming purposes, use of water for an approved water supply of any municipality if the use was in effect on July 1, 1969, or to any particular use in existence on January 1, 1934, if that use has not been abandoned." 1973 Md. Laws ch. 4 § 8-802(B) [VX 323].

The original 1933 Act also had a savings clause which specified that nothing in it should be "construed so as to impair any riparian or other vested right."[499] That language is retained in the current version of the statute. Md. Code Ann., Envir., § 5-512(b) ("The provisions of this subtitle do not impair any riparian or other vested right. . . .") [VX 325].

(2) Virginia's Non-Acquiescence in Maryland's Permitting Authority Was Made Clear in the 1970s and Acknowledged by Maryland.

Within three years after Maryland amended its permitting statute in 1973 in a way that its language could be read to apply to Virginia, Virginia and Maryland clearly understood that Virginia disputed Maryland's claimed authority to regulate Virginia's withdrawals from the Potomac River. The following highlights clearly demonstrate that Maryland's authority was disputed by Virginia:

- In a legal opinion prepared on June 21, 1976 by the Office of the Maryland Attorney General for the Maryland Secretary of the Department of Natural Resources, the Assistant Attorney General acknowledged a "continuing dispute" concerning "whether or not municipalities located within Virginia and West Virginia are subject to the laws of the State of Maryland when those entities seek to exercise their riparian rights as a user of surface water of

[499] *Id.* § 15.

the Potomac River."[500] He noted that Maryland's requirement "has been subject to growing challenge" by other jurisdictions.[501]

- In testimony before Congress in 1976, in connection with the statute authorizing the Potomac River Low Flow Allocation agreement, Virginia representatives repeatedly affirmed Virginia's right to withdraw water from the Potomac River based on the Compact of 1785 and Clause IV of the Black-Jenkins Award,[502] and representatives of the Army Corps of Engineers publicly observed that Maryland's claimed permitting authority over Virginia was contested.[503]

- Maryland was well aware of Virginia's contentions and, in response, agreed to amend the text of the proposed LFAA statute "to leave open the question of whether Maryland could apply its permitting authority to Virginia. . . ."[504] The resulting statute, Section 181 of the Water Resources Development Act of 1976, specifically provided as follows:

> ***Riparian rights or other authority of*** Maryland, ***Virginia***, political subdivisions; authority of District of Columbia. Except as may be provided in the agreement referred to in subsection (a)(2) of this section, ***nothing in this section shall alter any riparian rights or other authority of*** the State of Maryland, or any political subdivision thereof, ***the Commonwealth of Virginia, or any political subdivision thereof***, or the District of Columbia, or authority of the Corps of Engineers existing on the date of enactment of this section ***relative to the appropriation of water from, or the use of, the Potomac River.***

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[500] Letter from Burch & Rich to Coulter dated 6/21/76, at 1 [Sachs Dep. Ex. 7] [VX 154].

[501] *Id.*

[502] *See supra* text accompanying notes 49-50, 63-64, 77.

[503] *See supra* text accompanying notes 47-48.

[504] *See supra* text accompanying notes 73-75, 84-85.

42 U.S.C. § 1962d-11a(c) (emphasis added). There could hardly be a clearer act of non-acquiescence in Maryland's permitting authority than was recognized in this statute.

- Herbert Sachs, who headed the Maryland Water Resources Administration at critical times in the 1970s, admitted in his deposition in this case: "throughout my tenure with the Department I had seen several indications from writers in Virginia that they questioned Maryland's authority on issuing permits."[505]

- On July 8, 1976, Eugene Jensen, the Executive Director of the Virginia State Water Control Board, wrote to Herbert Sachs: "*It should be stated for the record, that Virginia has not recognized the Maryland permit and appropriation authority* for Virginia waters nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785."[506]

- At a meeting of high level officials on August 16, 1976, the Virginia representatives advised their Maryland counterparts "that Virginia has vested rights to Potomac Water and does not need to have an allocation permit from anyone to withdraw water."[507]

- In August 1977, in order "to provide evidence in a written document that Virginia is aware of its rights and intends to protect them,"[508] the Vice Chairman of the Virginia State Water Control Board wrote to Sachs that the Board was agreeable to Maryland's continued

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[505] Sachs Dep. at 107 [VX 139]; *see also id.* at 130-31 (acknowledging several such incidents).

[506] Letter from Jensen to Sachs dated 7/8/76 [VA-GEN-00224-225] (emphasis added) [VX 155]; *see supra* text accompanying note 53.

[507] Memorandum from Jones to Jensen dated 8/17/1976 [Sachs Dep. Ex. 11] [VX 158]; *see supra* text accompanying notes 67-69.

[508] Memorandum from Fisher to Members, State Water Control Board, dated 8/4/77, at 3 [VA-SRC-1326-30] [VX 182].

issuance of water appropriation permits to Virginia users, until Virginia enacted its own permitting system.[509] This letter essentially "authorize[d] Maryland to operate a permit program on behalf of Virginia, in effect as its agent. The letter also serves notice that at some point Virginia may wish to operate its own permit system for the use of Potomac water in Virginia. . . ."[510]

- At a public hearing concerning the LFAA conducted on September 13, 1977, by the Army Corps of Engineers, a Virginia State Water Control Board representative appeared and testified that:

> The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by Compact and expects those rights to be honored. *Virginia has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions.*[511]

- The LFAA, dated January 1978, contained savings clauses in Articles 3(C) and 3(F) specifically to protect Virginia's rights and authority in the Potomac River.[512] Herbert Sachs, who knows more about the negotiations surrounding the LFAA than any other Maryland official,[513] testified that the purpose of these savings provisions was "to protect any right that Virginia thought that it had with respect to regulating water use."[514] Maryland's Brief mentions

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[509] Letter from Bourassa to Sachs dated 8/5/77 [Sachs Dep. Ex. 26] [VX 183].

[510] Memorandum from Fisher to Members, State Water Control Board, dated 8/4/77, at 3 [VA-SRC-1326-30] [VX 182].

[511] Schwarberg Statement, *supra* note 106, at 2-3 (emphasis added) [VX 187]; *Public Meeting Record: Potomac River Low Flow Allocation Agreement*, *supra* note 106, at 74 (emphasis added) [VX 258]; *see supra* text accompanying notes 106-08.

[512] *See supra* text accompanying notes 114-21.

[513] Sachs Dep. at 56 [VX 139].

Article 3(C) twice but omits, inexplicably, the portion preserving *Virginia's* authority. Md. Br. at 20, 73.

- On March 21, 1979, the Virginia General Assembly enacted the Potomac River Riparian Rights Act. 1979 Va. Acts ch. 307 [VX 296, 307]. The Act reaffirmed Virginia's rights in the Potomac River under Article VII of the Compact of 1785 and Clause IV of the Black-Jenkins Award. *Id.* § 62.1-44.114. It further provided: "In the event non-Virginia claimants question or seek to abridge the riparian use of the waters of the Potomac River by Virginia riparian owners, the State Water Control Board shall advise and assist such riparian owners in the proper exercise and protection of their rights, giving due consideration to the rights of others and to the wise use of the water, and the Board shall assist in the resolution of conflicts concerning such rights." *Id.* § 62.1-44.116.

- At a Senate hearing in October 1979, Virginia's representative testified:

> Virginia's riparian rights to the reasonable use of the Potomac River have been partially addressed by the Low Flow Allocation Agreement, and are being further pursued through [Virginia] Senate Bill 440, which establishes the Potomac River Riparian Rights Act.[515]

- In a report to the Virginia Governor in July 1981, the Virginia State Water Control Board advised that "Virginia's Riparian Rights to the Potomac have always been and

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[514] Sachs Dep. at 218-19, 220 (discussing LFAA Art. 3(C)); *id.* at 221-22 (same, discussing LFAA Art. 3(F)); *id.* at 208 (Sachs intended in the negotiations "to protect the existing authorities of the various jurisdictions . . . to issue permits," including Virginia) [VX 139].

[515] District of Columbia Water Supply, *supra* note 23, at 193 (written testimony of Thomas M. Schwarberg) [VX 260]; *see also id.* at 189.

will be protected and this Low Flow Agreement is producing positive results, and will continue to do so."[516]

- On November 30, 1999, Virginia Attorney General Earley wrote to Maryland Attorney General Curran, asserting that Virginia's interstate compact rights entitled the FCWA to construct its offshore intake without permit approval from Maryland.[517] General Earley insisted that Maryland either issue a fully effective permit immediately, or make formal acknowledgement that no such permit was required before proceeding with the project.[518]

In short, there is ample evidence of non-acquiescence by Virginia from 1976 through 1999. Virginia did not need to file suit against Maryland in order to express her non-acquiescence. "Rather, the test for non-acquiescence is a multi-faceted one that permits an expression of sovereignty to be shown in any 'practical way,' including litigation. A state may *interrupt the continuity* of the other state's adverse claim by 'protest, in the international context, short of use of force.'"[519] Significantly, Maryland expressly acknowledged Virginia's non-acquiescence in § 181 of the Water Resources Development Act of 1976, and in the LFAA in 1978. This evidence is more than sufficient to defeat Maryland's defense of prescription and acquiescence, not only because the period of the alleged prescriptive activity by Maryland is too short, but because Virginia repeatedly advised Maryland about her position that Maryland did

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[516] Letter from Bourassa to Dalton dated 7/9/81, at 4 [VA-GEN-644] [VX 206].

[517] Defendant's Answer to RFA No. 48 & Ex. 20 (Letter from Earley to Curran dated 11/30/99) [VX 141].

[518] *Id.* at 2.

[519] Report of Special Master Paul R. Verkuil, , *New Jersey v. New York*, 1997 WL 291594, *52 (Mar. 31, 1997) (citations omitted, emphasis added).

not have the authority to regulate Virginia's Potomac River access rights or to impede Virginia's access.

(3) The Water Appropriation Permits Issued Prior to 1976 Carry No Weight.

Maryland places significant weight on the fact that it issued a water appropriation permit to Fairfax County in 1957, to the Town of Leesburg in 1967, to the FCWA in 1974, and to the Northern Virginia Regional Park Authority in March 1976. As noted above, the Maryland permitting statute, until 1973, applied only to political subdivisions of *Maryland*, and it specifically exempted withdrawals for municipal water supplies. It is unclear in retrospect why local officials in Fairfax County or the Town of Leesburg might have thought that Maryland law even required a permit in these circumstances. In any case, given the clear evidence of non-acquiescence by Virginia in 1976 and thereafter, and Maryland's acknowledgement in 1976 before Congress -- and in later negotiations surrounding the LFAA -- that its permitting authority was disputed, the issuance of these earlier permits carries no weight in showing acquiescence by Virginia.[520]

Moreover, because these early permits involved no impediment to Virginia's Potomac River access rights, there would have been no "case or controversy" to support the filing of an

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[520] Maryland's statement that "[a]t one point," a member of the Virginia State Water Control Board asked that the FCWA's 1974 water appropriation permit "be issued to the Commonwealth itself, instead of the Authority," is inaccurate and misleading. Md. Br. at 71-72. Maryland bases that statement on the deposition testimony of Herbert Sachs. *See* Sachs Dep. at 109-10 [VX 139]. But later in his deposition, in a passage not included in Maryland's submission, Sachs was uncertain if he was confusing this memory with a different communication he had with a Virginia official about whether riparian rights in the Potomac River *belonged* to the Commonwealth or to the individual Virginia riparian owner. *See* Sachs Dep. Ex. at 161-62 ("Q. Is that the subject you mentioned earlier in terms of your discussions with Mr. Davis? A. I don't know. Q. Could that have been what you were referring to? A. I can't say for sure. I don't know. Q. It might have been; you don't know? A It may be, but I don't know for certain.").

original action. For example, Fairfax County obtained its 1957 permit without any plans to construct a water intake or to withdraw water.[521] The permit was transferred to the FCWA in 1958.[522] Renewed periodically thereafter, the permit was canceled by the Maryland Department of Geology, Mines & Water Resources in 1964 due to the absence of foreseeable construction.[523] The cancellation was without prejudice to renewing the permit once the "plans actually involve the taking of water from the Potomac River."[524] Thereafter, when a new water appropriation permit application was subsequently submitted by the FCWA, the FCWA's permit was issued in 1974 "without controversy."[525]

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[521] There is no evidence that this early permit was ever brought to the attention of Virginia state officials or left any impression on Maryland officials. For instance, a Maryland Assistant attorney general wrote in 1971 that "the *only* request we have received from Virginia communities *up to the present time* has been that from the Town of Leesburg." Letter from Rich to Carter of 9/14/71 [MD-MDE-16538] (emphasis added) [VX 144].

[522] Md. Ex. X ¶ 10 & Exs. 8-9.

[523] Md. Ex. X ¶ 11-15.

[524] Letter from Weaver to Corbalis dated 2/17/64, Md. Ex. X at Ex. 13.

[525] The Director of the Water Resources Administration responsible for issuing the permit, Herbert Sachs, testified as follows:

> Q Did you have any personal involvement in the decision making of the Water Resources Administration in the seventies to issue a water appropriation permit to the Fairfax County Water Authority?
>
> A Yes, sir.
>
> . . .
>
> A And Maryland issued its permit.
>
> Q Without controversy?
>
> A We had none at all.

Sachs Dep. at 239 [VX 139].

(4) The Water Appropriation Permits Issued After 1976 Carry No Weight.

Similarly, the water appropriation permits issued by Maryland to Virginia users after 1976 must be discounted by three factors. First, Maryland has exaggerated the number of Virginia applicants to whom it has issued water appropriation permits on "29 occasions," Md. Br. at 70, by counting each permit renewal as a separate event.[526] The number of distinct users associated with the "29 occasions" is actually 15.[527]

Second, the post-1976 applications were not made over a sufficiently long period to constitute acquiescence. *See supra* Argument, Part II(A)(2).

Third, the post-1976 applications must be discounted by the fact that, in August 1977, the Virginia State Water Control Board advised Maryland's Water Resources Administration that it was agreeable to Maryland's continued issuance of water appropriation permits to Virginia users until further notice (such as when Virginia adopted its own permitting system).[528] This letter was an "expression of sovereignty" in a "practical way,"[529] and it was sent "to provide evidence in a written document that Virginia is aware of its rights and intends to protect them."[530] Allowing

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[526] Maryland has counted, for example, six permit renewals for the FCWA, Md. Ex. X ¶¶ 20, 24, 27, 32, 37, 38; and four renewals for the Town of Leesburg, *id.* ¶¶ 21, 26, 33, 41.

[527] Included in the 15 was Northern Virginia Regional Park Authority, which in March 1976 took over the water appropriation permit obtained in 1966 by the Potomac Electric Power Company (also included in the 15, *id.* ¶ 17) for the irrigation of a golf course in Loudoun County. Md. Ex. X ¶ 22 & Ex. 21; Pajerowski Dep. at 80-83 [VX 140]. Also included is the Town of Lovettsville, Virginia, which has not yet built any intake and has not withdrawn any water from the River. Pajerowski Dep. at 79-80.

[528] Letter from Bourassa to Sachs dated 8/5/77 [Sachs Dep. Ex. 26] [VX 183].

[529] Report of Special Master Verkuil, *supra* note 519, at *52.

[530] Memorandum from Fisher to Members, State Water Control Board, dated 8/4/77, at 3-5 [VA-SRC-1326-30] [VX 182].

permit applications to Maryland to proceed for a time thereafter, when none were denied, was not inconsistent.

(c) Maryland's Argument Based on its Waterway Construction Permitting System Fails.

The permits issued by Maryland for waterway construction activities in the Potomac River also carry little weight in showing that Virginia has lost its Potomac River access rights through prescription and acquiescence.

(1) The Fact that Federal Law Compels Virginians to Seek § 401 Certifications from Maryland Under the Clean Water Act Undercuts the Weight of Maryland's Evidence.

Before addressing the waterway construction permits upon which Maryland relies, it is important to understand the requirements imposed by federal law on anyone seeking to construct an improvement appurtenant to the Virginia shore of the Potomac River. The fact that federal law compels Virginians to seek § 401 certifications from Maryland under the Clean Water Act significantly undercuts the weight of Maryland's evidence.

Section 10 of the Rivers and Harbors Act of 1899, as amended, prohibits the construction of any structure in the navigable waters of the United States except based on plans recommended and approved by the U.S. Army Corps of Engineers. 33 U.S.C. § 403; 33 C.F.R. § 320.2(b) (2001); 33 C.F.R. § 322.3(a) (2001). The Corps considers the Potomac River to be navigable for purposes of this requirement as least as far as Cumberland, Maryland.[531] Accordingly, any

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[531] *See* Chesapeake Research Consortium, Inc., CRC Public. No. 38 at 39, *Report on the Potomac River: An Investigation to Determine Navigability, prepared for the Baltimore District, Corps of Engineers, pursuant to Contract No. DAC W31-74-C-0* (March 1975) [VX 275] ("An examination of record at the office of the Baltimore District of the Corps of Engineers indicated that the Corps has undertaken to regulate the stretch of the Potomac from tidewater to Cumberland. Between 1957 and 1973 twenty-five permits have been issued pursuant to Section 10 concerning this stretch of the Potomac."); *see also Mullenix v. United States*, 984 F.2d 101, (continued...)

Virginian seeking to construct an improvement appurtenant to property on the Virginia shore of the Potomac River has been obliged to seek a federal permit from the United States Army Corps of Engineers.

Section 404 of the Clean Water Act requires a permit from the Corps of Engineers for any activity involving the discharge of dredged or fill material into the waters of the United States. 33 U.S.C. § 1344; 33 C.F.R. § 320.2(f) (2001). In 1972, Congress amended the Clean Water Act to add a requirement in Section 401 that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act." 33 U.S.C. § 1341; 33 C.F.R. §§ 320.3(a), 323.3 (2001). A state is free to waive the § 401 water quality certification, and the requirement is deemed waived if the state does not act "within a reasonable period of time (which shall not exceed one year) after receipt of such request. . . ." 33 U.S.C. § 1341(a)(1).[532] Regulations of the Secretary of the Army implementing the "reasonable period" provision further specify that a waiver occurs if a state fails to act within 60 days after receiving the request for certification from the applicant.[533]

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104 (4th Cir. 1993) (holding that the Potomac River at Dam 5 near the West Virginia border was navigable for purposes of establishing federal admiralty jurisdiction because it was susceptible of use for trade or travel).

[532] For instance, Maryland waived the § 401 requirement applicable to the Fairfax County Water Authority's offshore intake project because it failed to act at all, much less within one year of the application. Stipulation of Parties Concerning § 401 Water Quality Certification (Nov. 12, 1998) [VX 239]; U.S. Army Corps of Engineers, Memorandum for the Record by Col. Carrol dated 2/1/01 at VA-Gen-780 [VX 232].

[533] 33 C.F.R. § 325.2(b)(1)(ii) (2001).

Congress imposed this waiver provision to ensure that State inaction would not interfere with the issuance of Federal permits.[534]

Thus, since 1972, Virginians have had to apply to Maryland under the Clean Water Act for a § 401 water quality certification in order to construct improvements in the Potomac River. Because this is a requirement of federal law, applicable to federally-permitted projects in every state, Virginia does not contend that it violates the Compact of 1785 or the Black-Jenkins Award. The requirement will continue to apply to projects in the Potomac River regardless of whether Maryland's other permit requirements are invalidated as a result of this case.

This fact, however, must "exact a discount from the probative force of much of the evidence" Maryland presents concerning prior waterway construction permit applications. *New Jersey v. New York*, 523 U.S. at 790. In *New Jersey v. New York*, New York's evidence that it had exercised sovereignty over the additional filled lands added to Ellis Island was discounted by the fact that, under the compact of 1834, New York was already granted sovereignty over the original island. *Id.* ("[A]s between New York and New Jersey, New York is concededly vested with whatever state sovereignty may be exercised over the original portion of the Island. . . .").

Similarly, the fact that Virginians have been required under federal law since 1972 to apply to Maryland for water quality certifications must discount the weight of Maryland's permit application evidence in showing that Virginia has acquiesced in other permit processes that Maryland has applied. That is particularly true where, as here, Maryland and the Corps have a

[534] H.R. Rep. No. 92-911, 96th Cong., 2d Sess. 122 (1972) ("In order to ensure that sheer inactivity by the State . . . will not frustrate the Federal application, a requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived."); *California ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992) (explaining that this provision was based on Congress' concern about the "ability of states to delay indefinitely their acceptance of a certification request.").

joint permit process that covers both federal requirements under § 401 and Maryland state requirements,[535] and where Maryland did not deny *either* a § 401 certification or a waterway construction permit to any Virginia applicant until it blocked the FCWA's project in 1997. In this respect, the case resembles *United States v. California*, 332 U.S. 19 (1947). The Court there held that the federal government's 25-year delay in challenging a 1921 California permitting requirement for offshore oil and gas leases did not bar it from contesting California's ownership of the three-mile belt. The Court observed that, "until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt." *Id.* at 39. Likewise, until MDE in 1997 both withheld a § 401 certification and denied a waterway construction permit to the FCWA, there was no need to focus attention on whether Maryland could impose any *state* permit requirements on Virginia users beyond the § 401 requirement imposed by federal law.

(2) Maryland's Argument Based on its Non-Tidal Waterway Construction Permitting System Fails.

The Maryland statute governing waterway construction activities in the Potomac River was first enacted in 1957.[536] The permit requirement in the original 1933 Act did not specify that

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[535] *See* 33 C.F.R. §§ 320.1(a)(5), 320.4(j)(6) (2001) (calling for joint permitting procedures); COMAR 26.08.02.10(B)(3) ("By agreement with either federal or State agencies in order to facilitate the certification process, the Department may develop a joint application for a federal license or permit and State water quality certification."). For examples of Maryland's joint permit proceedings, *see* Letter from MDE to Smedley dated 1/16/96 at 2 [FCWA/MDE Joint Ex. 69] ("Obtaining the authorizations checked above will satisfy the requirements of the Water Management Administration and the federal permit from the U.S. Army Corps of Engineers."); Md. Ex. Y ¶ 15 (referencing "Joint Federal/State Application"); *id.* Ex. 13 at MD-MDE-23608, 23615; *id.* Ex. 14 at MD-MDE-12243; *id.* Ex. 15 at MD-MDE-12249; *id.* Ex. 16 at MD-MDE-12257.

[536] 1957 Md. Laws ch. 757 [VX 321].

it applied in the Potomac River. *See* 1933 Md. Laws ch. 526 § 5 [VX 318], *codified at* Md. Code Ann. Art. 66C, § 669 (Michie 1951) [VX 319]. The new law in 1957 provided that:

> 669A. It shall be unlawful for *the State* or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality *or other political sub-division of the State* to construct, re-construct, change, or make an addition to any conduit, pipe line, wire cable, trestle or other device, structure or apparatus, in, under, through or over the bed or waters of the Potomac River, without obtaining a permit therefore from the Department of Geology, Mines and Water Resources. The obtaining, use and holding of such a permit shall be subject severally to the provisions concerning permits found elsewhere in this sub-title.[537]

As with the original 1933 Act, the term "the State" was used in the 1957 Act to refer to the State of Maryland and its political subdivisions, not to Virginia. That term remained in the statute until the same 1973 re-codification mentioned above, when the term was replaced with the broader term "person."[538] The 1957 Act is now found at Md. Code Ann., Envir., § 5-504 [VX 325].

Maryland cites nine Virginia persons or entities that have applied to Maryland for waterway construction permits.[539] The earliest permit to a Virginia entity was issued to the

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[537] *Id.* (emphasis added).

[538] 1973 Md. Laws ch. 4 § 8-804 [VX 323].

[539] Town of Leesburg (3 permits); Md. Ex. Y ¶¶ 3, 12, 16); James and Joyce Rocks (3 permits); Md. Ex. Y ¶¶ 4, 7, 9; Northern Virginia Regional Park Authority (2 permits); Md. Ex. Y ¶¶ 6, 10; FCWA (2 permits); Md. Ex. Y ¶¶ 8, 20; Colonial Pipeline (2 permits); Md. Ex. Y ¶¶ 11, 15; AT&T; Md. Ex. Y ¶ 14; Columbia Gas Transmission Co.; Md. Ex. Y ¶ 17; Washington-Virginia Traditional Development Sites, Inc.; Md. Ex. Y ¶ 18; and Mark Millsap; Md. Ex. Y ¶ 19. Two of the applicants cited by Maryland were not Virginia entities: PEPCO, Md. Ex. Y ¶ 5 & Ex. 3; and the Maryland State Highway Administration, Md. Ex. Y ¶ 13. One of the nine Virginians, Mr. Millsap, resides in Virginia, but the permit was for his pier on the West Virginia shore. *See* Defendant's Responses to Interrogatories at Ex. 4 (Entry 35) [VX 142].

Town of Leesburg in 1968 for the construction of its drinking water intake,[540] although the Town was not ready to begin construction until 1980.[541] The remaining permit applications were submitted after 1971, when Virginia users were required to obtain a § 401 water quality certification from Maryland. That fact, combined with the fact that Maryland never blocked any construction project until 1997, undercuts the weight of that evidence for the reasons stated above. Even using 1968 as the earliest date for acquiescence, the 32 years that elapsed until Virginia filed suit is not long enough to satisfy Maryland's legal burden.[542] Moreover, a handful of Virginia citizens and localities could not waive rights belonging to the Commonwealth, even if one assumed, for the sake of argument, that that had been their intention.[543]

(3) Maryland's Argument Based on its Tidal Wetlands Permitting System and VMRC Staff Correspondence Fails.

Maryland seems to think that its strongest evidence of prescription and acquiescence is found in 250-350 "authorizations" it has issued for Virginia shoreline projects in the tidal Potomac since the adoption of its Tidal Wetlands Act in 1970, and in numerous letters written by the staff of the Virginia Marine Resources Commission ("VMRC") referring Virginia

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[540] Md. Ex. Y ¶ 3 & Ex. 1.

[541] *See* Memorandum from Dietemann to Ports dated 11/12/78 [MD-MDE-8993] [VX 203] (internal Maryland agency memorandum noting that the Town of Leesburg received a water appropriation permit in 1968, that "[i]t now appears they are ready to construct their intake facility," and that Leesburg should be advised to submit a waterway construction permit application); Letter from Ports to Niccolls dated 11/13/78 [MD-MDE-8994] [VX 204] (Maryland agency letter directing the Town of Leesburg to submit a waterway construction permit application). The Town applied for the new waterway construction permit in March 1980, Md. Ex. Y at Ex. 10 (MD-MDE-13103-03), and the permit was issued in July 1980, *id.* Ex. 10 (MD-MDE-12236).

[542] *See supra* Argument, Part II(A)(2).

[543] *See supra* Argument, Part II(A)(3).

landowners to Maryland for permitting requirements that Maryland might impose on projects extending beyond the boundary line.[544] A typical letter from a VMRC staff person, Maryland points out, would state that the VMRC did not have jurisdiction over subaqueous lands beyond the Virginia-Maryland boundary, and that "I am forwarding a copy of your letter to the U.S. Army Corps of Engineers, Baltimore Maryland District, and the Maryland Department of Natural Resources. Both of these agencies would have jurisdiction over this project."[545] Maryland also emphasizes a Board of Public Works Policy, adopted by Maryland in 1987, concerning projects in the tidal Potomac along the Virginia shore.[546] Maryland argues that the policy "had been shared with representatives of the Virginia counties along the Potomac, the VMRC, and the VMRC's counsel, Frederick Fisher, who offered no changes."[547] In 1994, Maryland promulgated the 1987 Policy as a regulation, COMAR 23.02.04.21.[548]

This evidence is insufficient to prove that Virginia has lost any rights in the tidal-Potomac through prescription and acquiescence. First, the tidal wetlands "authorizations" cited by Maryland constitute extremely weak evidence of prescription. Most are not permits at all, but simply letters recognizing that *no permit or license* from the State of Maryland was needed.[549] Of the "between 250 and 350 authorizations" cited by Maryland, only some 63 actually involved

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[544] Md. Br. at 21 (citing 1970 Md. Laws ch. 241), 63.

[545] *Id.* at 63.

[546] *Id.* at 64-65.

[547] *Id.* at 65.

[548] *Id.* at 66.

[549] Md. Ex. BB at Ex. 251 (MD-MDE-7848) (same); *id.* Ex. BB at Ex. 254 (MD-MDE-7504) (same); *id.* Ex. BB at Ex. 256 (MD-MDE-7522).

the issuance of a Maryland license.[550] By contrast, the typical Maryland letter would state: "I have reviewed the information and have determined that the proposed activity does not require a Tidal Wetlands License from the State of Maryland."[551] The 1987 Maryland Policy and COMAR 23.02.04.21 similarly exempted the vast majority of improvements that are constructed at the Virginia shoreline from any Maryland license requirement.[552]

Second, Maryland's issuance of tidal wetlands "authorizations" for wharves and piers, which evidently began in 1972, has not continued for the length of time necessary to establish prescription. Twenty-eight years would not be long enough for the reasons previously stated.[553] In fact, the earliest VMRC letters cited by Maryland, supposedly as "explicit" evidence of acquiescence by Virginia, occurred "[b]eginning in the 1980s,"[554] less than 20 years before Virginia filed this action.

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[550] Declaration of Ellen D. Kennedy ¶ 5 [VX 136].

[551] Md. Ex. BB at Ex. 251 (MD-MDE-7848) (Letter from MDE dated 2/23/01); *see also* Md. Ex. BB at Ex. 22 (VA-MRC-694) (1984 letter from Maryland Department of Natural Resources stating: "[a] Maryland wetlands license is not required for the proposed construction."); Kennedy Decl. ¶¶ 3-4 [VX 136].

[552] *See* 1987 Maryland Policy, Md. Ex. AA ¶ 20 & Ex. 11 at MD-BPW-401 (identifying the following activities that "do not require a wetlands license from the State of Maryland": "[p]iers and related marine dependent structures on pilings," and "[b]ulkhead, revetment, boat ramps, landscaping, vegetative shoreline stabilization projects and related filling activities posing only nearshore impacts along the Virginia shoreline of the tidal Potomac"); COMAR 23.02.04.21(B) (exempting from any license requirement, among other things, "private noncommercial piers, bulkheads, revetments, boat ramps, landscaping, vegetative shoreline stabilization, and related filling activities").

[553] *See supra* Argument, Part II(A)(2).

[554] Md. Br. at 63.

Third, because Virginia does not dispute that Maryland has authority to issue water quality certifications under § 401 of the Clean Water Act,[555] there is nothing inconsistent in the VMRC's transmitting copies of permit applications to *both* Maryland and the Army Corps of Engineers when construction projects would extend beyond the Virginia-Maryland line. Such projects require a § 401 certification or a waiver from Maryland.

Fourth, Maryland misunderstands the VMRC's limited jurisdiction under Virginia law. The VMRC issues permits for all reasonable uses of *Virginia*-owned bottom lands (submerged lands) not otherwise authorized by statute. Va. Code Ann. § 28.2-1204 (Michie 1997).[556] Because the boundary line between Virginia and Maryland is no longer in dispute, the VMRC does not have any jurisdiction over the Potomac riverbed on the Maryland side of the boundary. For that reason, the VMRC does not issue any permits for the use of bottom lands beyond the boundary line.[557] But the fact that the VMRC does not issue permits does not establish, *ipso facto*, that Maryland has the authority to control the rights of Virginia and its citizens to build structures appurtenant to the Virginia shore.

Finally, Maryland exaggerates the significance of the VMRC letters and the 1987 Maryland Policy because it ignores the distinction between the VMRC *staff*, on the one hand, and the policy-making commissioners of the VMRC, on the other. The Marine Resources Commission consists of nine commissioners appointed by the Governor. *See* Va. Code Ann. § 28.2-102 (Michie 1997). It is the *Commission* as a public body that exercises all policy-

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[555] *See supra* Argument, Part II(A)(2).

[556] *See also* Md. Ex. CC Ex. 15, Virginia's Response to Maryland Interrogatory No. 7.

[557] Virginia localities, by contrast, are required by the Virginia Uniform Statewide Building Code to regulate structures extending from the Virginia shore, including piers and wharves. *See infra* text accompanying notes 575-76.

making functions within the scope of authority granted to it by law.[558] By contrast, the staff of the Commission is not authorized to promulgate any policy or regulations on behalf of the Commission.[559] As Robert Grabb, the Chief of the Habitat Management Division of the Virginia Marine Resources Commission, explains:

> This 1987 Maryland Policy was not reviewed or approved by the Commission. It was not submitted to the Commission for review because it did not reflect any policy to be accepted or promulgated by the Commission. It was discussed only at the staff level as a matter of administrative comity and convenience. It does not reflect the position of the Commission with respect to whether or not Maryland is legally authorized to impose particular requirements on Virginia applicants as a condition of constructing improvements in the Potomac River appurtenant to the Virginia shore. It was not advertised nor promulgated as a regulation or policy of the Commission.
>
> Similarly, the VMRC staff correspondence attached to Mr. Ayella's declaration [Md. Ex. BB] do not reflect the position or view of the Commission that Maryland has the legal right to block or restrict the efforts of any Virginia applicant to construct an improvement on the shore of the Potomac River. It has been the practice of the staff of the VMRC in recent years to forward Virginia permit applications to Maryland authorities for review when the project involves construction that extends into the Potomac River beyond the Virginia/Maryland line. Our correspondence in this regard has not been reviewed by the Commission. . . The staff of the VMRC does not know whether Maryland has any legal authority to impose regulatory requirements on Virginia landowners. We have simply forwarded such applications to Maryland as a matter of administrative comity. The staff of the VMRC does not intend its transmittal letters to constitute any sort of recognition that Maryland has any greater legal authority than it does, and the staff is certainly not authorized to bind the Commission with respect to the recognition of any such authority.[560]

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[558] Declaration of Robert W. Grabb ¶¶ 4-5 [VX 128].

[559] *Id.*

[560] Grabb Dec. ¶¶ 4-5.

Accordingly, neither the 1987 Maryland Policy nor the VMRC staff transmittal letters is evidence that the Commission, much less the Commonwealth of Virginia, has given up or waived any of Virginia's interstate compact rights.

3. The Opinions of the Virginia Attorney General Cited By Maryland Do Not Support Its Argument.

Maryland argues that several official opinions of the Virginia Attorney General support its claim of prescription and acquiescence. Md. Br. at 14-15, 57-58, 80. In Virginia, the Attorney General is authorized to issue an official opinion at the request of certain specified Virginia officials.[561] Except in cases where an opinion is requested by the Governor or a member of the General Assembly, "the Attorney General shall have no authority to render an official opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion."[562] Such opinions may be accorded persuasive value by courts of the Commonwealth, but they are not considered binding or controlling.[563]

None of the six official opinions upon which Maryland relies, Md. Ex. CC Exs. 8-13, supports Maryland's defense. The 1906 opinion observed that Virginia did not have jurisdiction

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[561] Va. Code Ann. § 2.2-505(A) (Michie 2001) (stating that such opinions may be requested by the Governor, a member of the General Assembly, a judge, the State Corporation Commission, an attorney for the Commonwealth, a county, city or town attorney, a clerk of a court of record, a city or county sheriff or treasurer, a commissioner of revenue, a chairman or secretary of an electoral board, or "the head of a state department, division, bureau, institution or board") [VX 299].

[562] *Id.* § 2.2-505(B).

[563] *E.g., Williams v. Augusta County Sch. Bd.*, 248 Va. 124, 127, 445 S.E.2d 118, 120 (1994) ("While those opinions have persuasive value, they are not binding on this Court."); *Arlington County Bd. v. Brown*, 229 Va. 341, 347, 329 S.E.2d 468, 472 (1985) ("Even though such interpretations are entitled to due consideration, they are, of course, not binding on us.").

to enforce liquor laws on the Maryland side of the boundary line.[564] The 1935 opinion concluded that Virginia did not have the authority to impose taxes on oysters removed from the Potomac River in Maryland.[565] The 1944 opinion advised that, while Virginia had the authority to enforce fishing laws and criminal laws in the Potomac River relating to offenses against persons under the Compact of 1785, the Attorney General was "unable to find any general criminal statute which purports to give Virginia general criminal jurisdiction over those waters."[566] The 1948 opinion stated that, while citizens of Virginia had "full property in the southern shore of the Potomac river and the privilege of building piers so long as navigation is not obstructed," the territorial jurisdiction of Virginia ended at the low-water mark, suggesting that Virginia could not prohibit the sale of beer on that part of a pier that extended beyond the boundary line.[567] *But see Skiriotes v. Florida*, 313 U.S. 69, 74-77 (1941) (holding that the State of Florida could enact laws governing the extra-territorial conduct of its own citizens); *Virginia v. Gaines*, 4 Va. 172 (1819) (authorizing prosecution under statute involving crimes by one Virginia citizen against another outside the territorial limits of the Commonwealth). The 1952 opinion advised that Virginia could not issue licenses for waterfowl blinds located on the Maryland side of the boundary.[568] Finally, in the 1967 opinion, the Attorney General concluded

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[564] 1906 Report of the Va. Att'y Gen. 87; Md. Ex. CC Ex. 8.

[565] 1934-35 Report of the Va. Att'y Gen. 147; Md. Ex. CC Ex. 9.

[566] 1944-45 Report of the Va. Att'y Gen. 92; Md. Ex. CC Ex. 10.

[567] 1948-49 Report of the Va. Att'y Gen. 118; Md. Ex. CC Ex. 11.

[568] 1952-53 Report of the Va. Att'y Gen. 116; Md. Ex. CC Ex. 12.

that adding fill material beneath a pier extending into the Potomac River would not change the boundary line with Maryland, which would continue to be at the low-water mark.[569]

None of those opinions held that Virginia was subject to Maryland's authority with respect to the withdrawal of water from the River or the construction of improvements from the Virginia shore. Indeed, the 1948 opinion specifically referenced Virginian's rights to construct such improvements.[570] Other opinions not cited by Maryland have reaffirmed Virginia's compact rights, both in the tidewater portion of the Potomac River as well as above tidewater.[571]

C. A Court of Equity Could Not Condone Giving Maryland Control Over Virginia's Potomac River Access Rights.

Even assuming that Maryland's equitable defense is not barred as a matter of law, for the reasons stated in Part II(A) above, the bottom line presented by Maryland's defense is this: does the conduct that Maryland contends amounts to prescription by Maryland, and acquiescence by Virginia, give Maryland the right to *forever* regulate and control Virginia's access to the Potomac River? The answer must be "no."

"[P]roceedings under this Court's original jurisdiction are basically equitable in nature," *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973), and the defense of prescription and acquiescence itself is an equitable doctrine. *Id.* In an original jurisdiction case, however, the rules of equity

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[569] 1966-67 Report of the Va. Att'y Gen. 48; Md. Ex. CC Ex. 13.

[570] Md. Ex. CC Ex. 11.

[571] 1954-55 Report of the Va. Attorney General 117 [VX 311] (concluding that the decisions in *Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926), and *Binney's Case*, 2 Bland 95 (Md. Ch. 1829), were erroneous, and that Virginians did not need Maryland licenses to fish in the non-tidal portion of the Potomac River); 1926-27 Report of the Va. Att'y Gen. 182 [VX 310] (opining that the Maryland Court of Appeals decision in *Middlekauff* was erroneous and that the Compact of 1785 applied along the entire course of the Potomac River).

will not be applied "when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice." *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895).

Allowing Maryland to prevail in this case, based on the meager evidence of acquiescence that it has brought to bear, would forever subject Virginia to Maryland's authority to control its access to the Potomac River. That result would be draconian and inequitable, particularly in light of the fact that: (i) the Virginia General Assembly has never given up, unequivocally or otherwise, her rights of access guaranteed by Article VII of the Compact of 1785 and Clause IV of the Black-Jenkins Award, and carried forward in Article VII, § 1 of the Potomac River Compact of 1958; (ii) the dispute over Maryland's authority was not brought to a head until 1997, when Maryland attempted for the first time to use its permitting process to block the FCWA's efforts to construct the offshore intake;[572] (iii) the rights at stake in this case, particularly the right to use the Potomac River as a water supply, are exceptionally important to the health and welfare of the people of Virginia; and (iv) Maryland is systemically incapable of fairly regulating Virginia's interests, for the reasons set forth in Part I(D)(3) above.

Allowing one State to control its sister state's access to a vital interstate stream would be unprecedented in this Court's jurisprudence, and contrary not only to the Maryland/Virginia compacts in question, but also to the "cardinal" rule applied in such cases: "equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).

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[572] State of Maryland, Reply to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness, at 5, 12 (filed 6/13/01).

III.
THE EFFECT OF A RULING IN FAVOR OF VIRGINIA.

A ruling in favor of Virginia in this case will simply invalidate Maryland's water appropriation and waterway construction permitting requirements as applied to Virginia users of the Potomac River. It will not invalidate the requirement that Virginians seeking to construct improvements appurtenant to their properties on the Virginia shore obtain permits from the Army Corps of Engineers under § 10 of the Rivers and Harbors Act, or § 404 of the Clean Water Act. It will not invalidate the requirement under § 401 of the Clean Water Act that they obtain from Maryland a water quality certification that construction in the River on the Maryland side of the boundary line will comply with Maryland water quality standards. There is little discretion afforded to Maryland regulators to reject a certification under § 401.[573] Moreover, as noted above, federal law imposes a tight timetable on the State review process.[574]

There will be no regulatory void should Virginia prevail. Each local government along the Potomac River in Virginia is required to regulate structures to ensure their compliance with

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[573] For example, Maryland's water quality standards for the main stem Potomac River in the Washington Metropolitan Area designate it as a "Use I-P." COMAR 26.08.02.08(N)(1). Standards applicable to Use I-P waters include the following: discharges must not include pathogenic, harmful organisms or toxic substances in excess of certain specified limitations, dissolved oxygen concentrations may not be less than 5 mg./ltr., temperatures outside the mixing zone may not exceed certain limits, normal pH must be not less than 6.5 or greater than 8.5, and turbidity resulting from a discharge may not exceed 150 NTU at any time or 50 NTU as a monthly average. COMAR 26.08.02.02(B)(1), (2), 26.08.02.03-3(A), (B). If the proposed activities will not cause a violation of applicable water quality standards, MDE has no discretion to deny the certification: "the Department *shall* issue the water quality certification." *See* COMAR 26.08.02.10(E)(1) (emphasis added).

[574] *See supra* text accompanying notes 532-34. Although it is conceivable that Maryland could in the future attempt to amend its § 401 standards or seek to apply them to Virginia in a manner violative of Virginia's federal common law or interstate compact rights, the Court need not address now how such a controversy would be resolved. As the Court observed in *Texas v. New Mexico*, 462 U.S. 554 (1983), "the mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States."

the Virginia Uniform Statewide Building Code,[575] including "piers [and] wharves."[576] In addition, the Army Corps of Engineers will continue to exercise its "public interest review" in issuing § 10 and § 404 permits. *See* 33 C.F.R. §§ 320.1(a)(1), 320.4 (2001). The Corps considers a project's impact on the public interest, fish and wildlife, water quality, and historic, cultural, scenic and recreational values. 33 C.F.R. § 320.4. It also ensures that any discharge of fill material in such waters will not harm the chemical, physical, and biological integrity of those waters or the ecosystem. 33 C.F.R. § 323.6(a).[577] Maryland is free to submit comments as part of that review process. Even if no Maryland construction permit can be required, "due consideration shall be given to those official views as a reflection of local factors of the public interest." 33 C.F.R. § 320.4(j)(1) (2001). Maryland is free to seek judicial review of any Corps permit decision under the Administrative Procedure Act, 5 U.S.C. § 702.

With respect to water appropriation, Virginia users will continue to report their Potomac River water withdrawals to the Virginia Department of Environmental Quality, in accordance with 9 Va. Reg. 25-200-10 through 25-200-50, and to the Department of Health, in accordance with 12 Va. Reg. 5-590-530.[578] As for enforcement of the LFAA, any Virginia "community or entity which seeks to appropriate water from the subject portion of the Potomac River shall either become a member party to this Agreement or shall be governed by a permit which

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[575] Va. Code Ann. §§ 36-97 through 36-119.1 (Michie 1996 & Supp. 2001); *see also* Virginia's Answer to Maryland's Interrogatory No. 7, Md. Ex. CC at Ex. 15, p.6.

[576] Va. Code Ann. § 36-97 (Michie 1996).

[577] The FCWA's offshore intake project, for instance, was specifically analyzed by the Corps for compliance with these requirements. U.S. Army Corps of Engineers, Memorandum for the Record by Col. Carrol dated 2/1/01 [VX 232].

[578] Virginia's Answer to Interrogatory No. 4, Md. Ex. CC at Ex. 15.

includes the low flow allocation formula and such other provisions as are necessary to effect the purposes of this Agreement."[579] Although Virginia does not presently require permits for water appropriation from the Potomac River (or from any other surface water body in the Commonwealth), this does not pose an intractable problem for complying with the LFAA. Virginia's largest user, the FCWA, is already a signatory to the LFAA.[580] For any other Virginia users subject to the LFAA, there are many compliance options. The user could opt to become a party to the LFAA or to be governed by a Corps permit that contains the LFAA requirement.[581] Alternatively, Section 3(C) of the LFAA specifically contemplates that Virginia might issue permits in the future.[582] Since Virginia enacted its Surface Water Management law in 1989, Va. Code Ann. §§ 62.1-242 through 62.1-253 (Michie 2001), it has the ability to implement a water appropriation permit system for the Potomac River.[583] Virginia could also enact a new statute requiring simply that all Virginia users obtain a permit from Virginia subjecting them to the requirements of the LFAA.

Although the LFAA already provides a formula for allocating Potomac River water between Maryland, Virginia and the District of Columbia in the event of a severe water shortage, future cooperation will obviously be needed to provide for additional upstream reservoirs to meet

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[579] LFAA, Art. 3(E) [VX 201].

[580] *Id.* at 1, 25.

[581] *E.g.*, Senate Hearings, Omnibus Water Resources Development Act, *supra* note 54, at 2011 (Statement of Rep. Gude that "I presume that as a matter of policy, the corps will not issue water withdrawal permits to anyone who is not a signatory to the low flow agreement, just as they have refused to issue a permit to the WSSC.") [VX 266].

[582] LFAA Art. 3(C) [VX 201].

[583] *See* Virginia's Answer to Interrogatory No. 4, Md. Ex. CC at Ex. 15. Virginia enacted its Surface Water Management Area law in 1989. 1989 Va. Acts ch. 721.

the needs of the jurisdictions after the year 2020.[584] Maryland has no control over water withdrawals by the Aqueduct[585] and is not in a position to solve future water supply problems on its own.[586] Solving that problem will require the type of cooperation that served the Washington Metropolitan area so well in the 1980s, when the regional water suppliers entered into the Water Supply Coordination Agreement and ancillary cost-sharing agreements.[587] Cooperation is not fostered by giving Maryland the power unilaterally to restrict Virginia's Potomac River withdrawals. The prerequisite to cooperation is to recognize the States' respective "equality of right." *Kansas v. Colorado*, 206 U.S. at 97.

IV.
MARYLAND'S COUNTERCLAIM SHOULD BE DISMISSED.

Maryland does not mention its Counterclaim in its summary judgment brief. Maryland's Counterclaim seeks a declaration that it has "the right to regulate the activities of Virginia entities that take place in the bed and waters of the Potomac River lying within Maryland and extending to the low water mark on the Virginia side."[588] Taken literally, Maryland's request for relief, if granted, would override existing interstate agreements that Maryland has not otherwise

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[584] *See supra* text accompanying notes 165-67.

[585] Sachs Dep. at 74-75 [VX 139]; Pajerowski Dep. at 111 [VX 140]; Md. Ex. X ¶ 74.

[586] *E.g.*, Pajerowski Dep. at 139-40 (MDE not involved in coordinating water supplies among the FCWA, WSSC or WAD); 141-42 (State of Maryland does not contribute money towards the costs of operating or maintaining upstream reservoirs) [VX 140].

[587] *See supra* Background, Part C; *compare Arizona v. California*, 373 U.S. 546, 564 (1963) (noting "this Court's often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement'") (*quoting Colorado v. Kansas*, 320 U.S. 383, 392 (1943), and *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945)).

[588] Maryland's Answer, Counterclaim, and Motion for Appointment of Special Master at 19 (filed 7/31/00).

challenged, such as the regulatory provisions contained in the LFAA (providing rules for the allocation of water during times of low flow), the Potomac River Compact of 1958 (establishing a bi-state commission for the regulation of fishing in the tidal portion of the Potomac), and reciprocal fishing agreements in the non-tidal Potomac which have not been in controversy.[589]

Virginia's Interrogatory No. 28 asked Maryland whether it contended that there was "a case or controversy, beyond the matters set forth in Virginia's Bill of Complaint, supporting the Court's exercise of original jurisdiction over Maryland's Counterclaim," and, if so, for Maryland to "state all facts that support that contention. . . ."[590] In response, Maryland failed to identify any matters in controversy beyond the issues of waterway construction and water appropriation.[591] Because there is no justiciable case or controversy beyond the matters raised in Virginia's Bill of Complaint, Maryland's Counterclaim must be dismissed.

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[589] *See* Md. Ex. CC at Ex. 15, Virginia's Answer to Interrogatory No. 13 (identifying interstate fishing agreements). Maryland and Virginia have both enacted legislation establishing reciprocal fishing privileges in the non-tidal Potomac. *See* Md. Code Ann., Nat'l Res., § 4-606(A) (Michie 2000); Va. Code Ann. § 29.1-535 (Michie 1997).

[590] Defendant's Answer to Interrogatory No. 28 [VX 142].

[591] *Id.*

CONCLUSION

The Special Master should recommend that the Court grant the relief requested in Virginia's Bill of Complaint and issue a decree enjoining Maryland from requiring that Virginia, its political subdivisions, and its citizens obtain water appropriation permits from Maryland as a condition of withdrawing water from the Potomac River, or waterway construction permits as a condition of constructing improvements appurtenant to the Virginia shore of the Potomac River. The Special Master should further recommend that Maryland's Counterclaim be dismissed.

RESPECTFULLY SUBMITTED,

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L-636

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L-637

No. 129, Original

In the
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

VIRGINIA'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Finally, this Court in *Maryland v. West Virginia*, 217 U.S. 577 (1910), decreed that West Virginia, as successor in interest to Virginia, is entitled to the same rights respecting the Potomac River that Virginia enjoys under the Compact of 1785 and the Black-Jenkins Award of 1877. The Potomac River between Maryland and West Virginia extends from 54 miles above the furthest tidal reach to 267 miles above the tidal reach. Nonetheless, Maryland conceded in that case that the Compact of 1785 was binding. It never contended, as it does now 90 years later, that those rights were somehow inapplicable above tidewater. Maryland's concession in that case, and this Court's determination that Virginia's compact rights apply far above tidewater, dispose of Maryland's contrary claim in the present dispute with Virginia.

Maryland bases its present position on two early Maryland state court decisions. In the first, a Maryland chancellor observed in dictum in 1829 that *nothing* in the Compact was intended to apply above tidewater. His commentary ignored the plain language of the Compact. In the second case, the Maryland Court of Appeals in 1926 adopted the earlier reasoning of the chancellor, inexplicably failing to mention either the Black-Jenkins Award of 1877 or this Court's 1910 decision in *Maryland v. West Virginia*.

Summary judgment is appropriate on this issue based on the plain language of the Compact of 1785, the Black-Jenkins Award of 1877 and this Court's decision in *Maryland v. West Virginia*.

BACKGROUND

American historians identify the Mount Vernon conference of 1785 as one of the key events that led to the Annapolis Convention in September 1786 and, later, to the Constitutional

Convention in Philadelphia in 1787.[1] Before he became this country's 28th President, scholar and historian Woodrow Wilson wrote:

> Everybody knows that it was a conference between delegates from Maryland and Virginia about [George] Washington's favorite scheme of joining the upper waters of the Potomac with the upper waters of the streams which made their way to the Mississippi - a conference held at his suggestion and at his house - that led to the convening of that larger conference at Annapolis, which called for the appointment of the body that met at Philadelphia and framed the Constitution under which he was to become the first President of the United States.[2]

Because this is the first opportunity of the parties to submit substantive briefs to the Special Master, this section sets forth background information about the Potomac River and provides a detailed history of the interstate compacts in question. It also describes the historical context in which the compacts were enacted.[3]

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[1] *E.g.*, 2 Robert A. Rutland, *The Papers of George Mason* 812 (1970) [hereinafter "2 Rutland"]; Douglas Southall Freeman, *Washington* 532-33 (1968) (Harwell ed.) [hereinafter "Freeman"]; Helen Hill, *George Mason: Constitutionalist* 182-83 (1938); 2 Kate Mason Rowland, *The Life of George Mason* 93 (1892) [hereinafter "2 Rowland"].

[2] Woodrow Wilson, *The Making of the Nation*, 80 Atlantic Monthly 1, 7 (1897). Popular history publications have likewise recognized this link. *E.g. Annapolis Convention*, Encyclopaedia Brittanica, *at* http://www.britannica.com (last visited Nov. 29, 2000) (describing the Annapolis Convention as "an important rallying point in the movement toward a federal convention to revise the inadequate Articles of Confederation. Growing out of an earlier meeting of representatives of Maryland and Virginia to discuss ways of improving navigation on the Potomac River, the convention of delegates from five states found that it could not deal effectively with national commercial problems without changes in the Articles. Realizing that they could not recommend the needed revisions, the delegates stretched their authority by issuing a new call to all the states for a meeting eight months later in Philadelphia, where the present federal Constitution was drafted.").

[3] A chronology of events related to the Compact of 1785 and its progeny is attached at Tab 1.

The River

The Potomac River flows for approximately 383 miles from its first spring on the North Branch in West Virginia, to the mouth of the River in the Chesapeake Bay.[4] The River marks the common boundary between Maryland, on the north shore, and West Virginia and Virginia, on the south shore. From its source, the River flows for 99 miles to the confluence of the North and South Branches near Green Spring, West Virginia,[5] and another 114 miles to the intersection of the Maryland State line and the West Virginia and Virginia State lines.[6] Another 54 miles takes it to Little Falls, just above the point where the River enters the District of Columbia opposite the Commonwealth of Virginia.[7] From that point it travels another 117 miles before emptying into the Chesapeake Bay.[8]

The tidal portion of the River extends from the Chesapeake Bay to the foot of Little Falls, just above the District of Columbia.[9] Thus, more than two-thirds of the length of the River lies above the tidal reach at Little Falls.

The Potomac River drains the eastern slopes of the Appalachian Highland and the Coastal Plain in the Mid-Atlantic region of the United States.[10] The drainage basin covers 14,670 square

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[4] Declaration of Roland C. Steiner ¶ 2, attached at Tab 3. A summary map is attached at Tab 2 for reference.

[5] *Id.* ¶ 3.

[6] *Id.* ¶ 4.

[7] *Id.* ¶ 5.

[8] *Id.* ¶ 6.

[9] *Id.* ¶ 5.

[10] Potomac River Basin Report, H.R. Doc. 343, 91st Cong., 2d Sess. 33 (1970) (Report of the Board of Engineers for Rivers and Harbors dated 12/16/1963).

miles, of which Virginia accounts for 39%, and Maryland 26%.[11]

The River is a national treasure, rich in scenic beauty. The President designated it in July 1998 as an American Heritage River.[12] The River also serves as the principal water supply for the Washington Metropolitan Area.

The ultimate issue in this original action proceeding is whether Maryland can regulate Virginia's use of, and access to, the Potomac River.

Conflicting Charters and Colonial Claims

Prior to 1776, the territories of Virginia and Maryland were the subject of inconsistent and conflicting charters and patents from various English Kings. *See Morris v. United States*, 174 U.S. 196, 223 (1898). The complex conflicts that ensued need not be untangled in order to resolve the present dispute. *Id.* at 223. Generally stated, Virginia's territorial claims were premised upon three charters issued by King James I in 1606, 1609, and 1612;[13] upon a patent

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[11] The respective drainage areas for the basin, as established by the Army Corps of Engineers (Potomac River Basin Report, H.R. Doc. 343, *supra* note 10, at 33), are as follows:

State	Drainage (mi.^{2})	%
Virginia	5,723	39.0
Maryland	3,818	26.0
West Virginia	3,490	23.8
Pennsylvania	1,570	10.7
District of Columbia	69	0.5
Total	14,670	100.0

[12] *See* American Heritage Rivers Initiative, 62 Fed. Reg. 48,860 (1997). The Environmental Protection Agency maintains a website concerning this initiative at http://www.epa.gov/rivers/ (last modified January 7, 2000).

[13] *See* Va. Code Ann. § 7.1-1 (Michie 1999); Commission (Maryland) on Boundary Lines Between Virginia and Maryland (1870-1874), *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia. Authorized by the act of 1872, chapter 210* at 235-40 (Annapolis 1874) (Statement of the Virginia Case)

(continued . . .)

from Charles II to Lord Hopton and others in 1649 for what afterwards became known as Virginia's "Northern Neck" (between the Rappahanock and Potomac Rivers); and upon a confirmatory patent for the Northern Neck by James II in 1688 to Thomas Lord Culpeper.[14]

The Second Charter of Virginia from King James I in 1609 included territory extending 200 miles north of Point Comfort (located at the mouth of the James River), which included land now within the State of Maryland.[15] By contrast, Maryland based its territorial claims on the charter granted in 1632 by Charles I to Cecilius Calvert, successor to Lord Baltimore, the second Baron of Baltimore and first Lord Proprietary of the province of Maryland. *Morris*, 174 U.S. at 223.[16]

Both the grant to Lord Baltimore in 1632 and the later grant of the Northern Neck to Lord Culpeper expressly included the Potomac River from shore to shore in their descriptions. *Morris*, 174 U.S. at 223-24. The charter to Lord Baltimore defined the south-western boundary of the province to run from the "first fountain of the river Potomac, then tending downward towards the south to the farthest bank of the said river. . . ." *Maryland v. West Virginia*, 217 U.S.

[hereinafter "Commission (Maryland) on Boundary Lines Between Virginia and Maryland (1870-1874)"].

[14] Commission (Maryland) on Boundary Lines between Virginia and Maryland (1870-1874), *supra* note 13, at 253-259; Brief on Behalf of West Virginia at 9-21, *Maryland v. West Virginia*, No. 1, Orig. (Oct. 21, 1909) [hereinafter "Brief on Behalf of West Virginia"]; *see also* Bill of Complaint (Commonwealth of Virginia) at 5, *Virginia v. Maryland*, No. 12 Orig. (1957) [hereinafter "Bill of Complaint (Virginia v. Maryland) (1957)"].

[15] Commission (Maryland) on Boundary Lines between Virginia and Maryland (1870-1874), *supra* note 13, at 237 (Statement of the Virginia Case); Brief on Behalf of West Virginia, *supra* note 14, at 11-12.

[16] *See also* Brief on Behalf of West Virginia, *supra* note 14, at 14-16; Bill of Complaint (Virginia v. Maryland) (1957), *supra* note 14, at 5-6.

1, 25 (1910). The grant of the Northern Neck was bounded on the north by the Potomac River, "together with the said rivers themselves. . . ." *Morris*, 174 U.S. at 223. Thus, as of the mid-17th century, the Royal land grants were in conflict as to the ownership of the Potomac River.

Virginia's Constitution of 1776

After the outbreak of the Revolutionary War, Virginia relinquished claims to certain territories contained in the charters of its neighboring colonies. Article 21 of the Virginia Constitution, adopted June 29, 1776, provided as follows:

> The territories contained within the charters erecting the colonies *Maryland, Pennsylvania, North and South Carolina*, are hereby ceded, released, and for ever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by *Virginia*, ***except the free navigation and use of the rivers Potowmack and Pokomoke, with the property on the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.***[17]

However, the Maryland constitutional convention in October 1776 rejected Virginia's action and asserted that the territory within Maryland's charter was not Virginia's to cede.[18]

Preliminary Efforts to Resolve the Jurisdiction of the Potomac River

Virginia appointed commissioners on December 10, 1777, to meet with Maryland commissioners "in order to adjust the rights of the use, and navigation of, and jurisdiction over,

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[17] 1776 Va. Const. Art. XXI, *reprinted in* 9 Hening's Statutes at Large c. II 112, 118 (1821) (emphasis in bold added).

[18] John V.L. McMahon, *An Historical View of the Government of Maryland: from its Colonization to the Present Day* 60 n.77 (1831) [hereinafter "McMahon"].

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the Bay of Chesapeake, and the rivers Potomac and Pocomoke. . . ."[19] George Mason, the principal author of Virginia's Constitution,[20] was one of the three Virginia commissioners appointed.[21]

Maryland responded on December 21, 1777, appointing Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase as commissioners.[22] (All three of these famous[23] gentlemen later attended the Mt. Vernon conference in 1785). A committee of the Maryland legislature prepared instructions for them.[24]

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[19] *Journal of the House of Delegates of the Commonwealth of Virginia* at 74 (1777) (White Ed. 1827) [hereinafter "*Journal of Virginia House of Delegates* (1777)"].

[20] Mason served as a Fairfax County delegate in the Virginia House of Burgesses from 1758 until 1766, and in the Virginia House of Delegates from 1777 to 1778. He served in the Virginia Constitutional Convention, drafting the Virginia Constitution of 1776. He later served as a Virginia delegate to the Constitutional Convention in Philadelphia in 1787. *See generally* 1 Robert A. Rutland, *The Papers of George Mason* cxi-cxxvii (1970) [hereinafter "1 Rutland"].

[21] *Journal of Virginia House of Delegates* (1777), *supra* note 19, at 74; 2 Rutland, *supra* note 1, at 755 (Letter from Mason to Randolph of 10/19/1782). The other Virginia commissioners were Thomas Ludwell Lee and James Henry. *Journal of Virginia House of Delegates* (1777), *supra* note 19, at 74.

[22] 2 J. Thomas Scharf, *History of Maryland* 529 (1879) (1967 reprint) [hereinafter "Scharf"].

[23] Samuel Chase was later appointed by George Washington as an associate Justice of this Court, where he served from 1796 to 1811. *See generally* Jane Shaffer Elsmere, *Justice Samuel Chase* (1980); James Haw, et al., *Stormy Patriot: The Life of Samuel Chase* (1980). Chase and Thomas Stone signed the Declaration of Independence on behalf of Maryland, along with William Paca and Charles Carroll of Carollton. Chase and Jenifer also attended the Constitutional Convention on behalf of Maryland in 1787. *See, e.g.*, 1 Rutland, *supra* note 20, at xlii, lxiv.

[24] Scharf, *supra* note 22, at 529-30.

No progress was made, however. When Maryland delayed ratifying the Articles of Confederation,[25] Virginia declined to move forward with the meeting of commissioners,[26] and subsequently the "exigencies of war shoved the plan aside."[27]

Maryland and Virginia did not revisit their respective jurisdictional claims until after the peace of September 1783.

The Mt. Vernon Compact of 1785

June 1784: Virginia Appoints Commissioners

On June 28, 1784, the Virginia General Assembly appointed four of its political leaders as commissioners to meet with commissioners from Maryland: George Mason (who had been appointed a commissioner in 1777), James Madison, Edmond Randolph and Alexander Henderson.[28] The Virginia resolution provided:

> Whereas, great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland, touching the jurisdiction and navigation of the river Potomac;

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[25] The Articles of Confederation, agreed to by Congress on November 15, 1777, became effective on March 1, 1781, upon ratification by Maryland.

[26] 2 Rutland, *supra* note 1, at 755 (Letter from Mason to Randolph of 10/19/1782).

[27] *Id.* at 813.

[28] Madison's place in history is well-known. *See generally* Robert A. Rutland, *James Madison, The Founding Father* (1987); 1 Rutland, *supra* note 20, at lxxv. Randolph was elected to the Virginia Constitutional Convention of 1776 and served on a committee that prepared a bill of rights and the Virginia Constitution. *See generally* id., at xc. He served as the first Attorney General of Virginia in 1776. *Id.* In 1786, he was elected Governor of Virginia and served as a Virginia delegate to the Constitutional Convention in Philadelphia, where he and Madison presented the influential "Virginia Plan." *Id.* President Washington later appointed him to the post of Attorney General for the United States. *Id.* Henderson served as a justice of the peace in Fairfax County from 1770 until after 1785, and served as a member of the House of Delegates from Fairfax County in 1781 and 1783. *Id.* at lx.

> Resolved, That George Mason, Edmund Randolph, James Madison, jun., and Alexander Henderson, Esquires, be appointed commissioners; and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland; and, in concert with them, frame such liberal and equitable regulations concerning the said river, as may be mutually advantageous to the two States; and that they make report thereof, to the General Assembly.[29]

The conference did not take place until March 1785, nine months later.

1784-1785: Virginia and Maryland Charter the Potomac Company

Between the time Virginia appointed commissioners and the actual meeting in March 1785, Maryland and Virginia aggressively pursued efforts to improve the navigation of the Potomac River above the Little Falls to the furthest extent practicable.

Origins of the Project

George Washington had wished for many years to make the Potomac River a commercial highway to the Ohio River in the west, thus directly linking the Atlantic to the Mississippi River and the Gulf of Mexico.[30] Washington had written as early as 1754 (when he was 22 years old)

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[29] *Journal of the House of Delegates of the Commonwealth of Virginia* at 84 (1784) (White Ed. 1828) [hereinafter "*Journal of Virginia House of Delegates* (1784)"]; 2 Rutland, *supra* note 1, at 813. Note that this Resolution did not deal with the Chesapeake Bay or the Pocomoke. Scharf misreported the text of the Resolution in his *History of Maryland*. *See* Scharf, *supra* note 22, at 530.

[30] *See generally* Washington Irving, *George Washington: A Biography* 625-26 (1994) [hereinafter "Irving"]; Walter S. Sanderlin, *The Great National Project: a History of the Chesapeake & Ohio Canal* 30 (1946) ("The successful launching of the company was primarily the result of one man's efforts and influence. George Washington had long been interested in the improvement of the Potomac, and was completely convinced of the practicability and superiority of the route it provided. Indeed, it has been said with considerable justification that the project had become almost an obsession, second only perhaps to his interest in the future of the Union."); Edward S. Delaplaine, *The Life of Thomas Johnson* 62 (1927) [hereinafter "Delaplaine"].

about his experience navigating the River from Frederick, Maryland to the falls.[31] He documented those portions where shallowness or obstructions made navigation difficult.[32] Notwithstanding those "inconveniences," Washington described the Potomac route at that time as "the most expeditious way to the Country."[33]

In 1770, Washington corresponded with Thomas Johnson, a prominent Marylander[34] and long time friend,[35] who shared his interest in improving the navigation of the River. Johnson proposed a plan to do so through means of private subscription.[36] While supportive of the goal,

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[31] 1 John C. Fitzpatrick, *The Writings of George Washington* 100-01 (1931) (Letter from Washington to Lee of 8/1754) [hereinafter "1 Fitzpatrick"].

[32] *Id.*

[33] *Id.* at 101. Washington was not alone in his belief. In January 1755, Maryland Governor Sharpe and Sir John St. Clair were visiting Fort Cumberland, making "an examination of the works, the supplies, and the arms; and two days were spent in inspection and consultation as to the additions that were necessary to the stores, and the best method of getting them to the camp. About the 28th these gentlemen stepped into a small boat, at Fort Cumberland, and descended the Potomac to Alexandria. They inspected the river the entire distance traversed, with a view to determining the feasibility of sending supplies to Fort Cumberland by water, and Sir John St. Clair was of opinion that such a project was entirely practicable, could the rocks in the channel at Great Falls be removed." William H. Lowdermilk, *History of Cumberland* 103 (1878) (1971 ed.).

[34] Johnson was elected the first Governor of Maryland in 1777. Frank F. White, Jr.,*The Governors of Maryland* 5 (1970) [hereinafter "White, *The Governors of Maryland*"]. Washington later appointed Johnson as a Justice of this Court, where he served from 1792 to 1793. *Id.* at 8. Johnson nominated George Washington as the Commander-in-Chief of the Continental Army on June 15, 1775. *Id.* at 4; Delaplaine, *supra* note 30, at 84; Freeman, *supra* note 1, at 219.

[35] White, *The Governors of Maryland, supra* note 34, at 8 (describing Washington as his "close friend").

[36] Delaplaine, *supra* note 30, at 68-71; 3 John C. Fitzpatrick, *The Writings of George Washington* 17-21 (1938) (Letter from Washington to Johnson of 7/20/1770).

Washington expressed skepticism that Johnson's plan could work without the active support of the legislatures of Virginia and Maryland.[37]

In 1772, Virginia granted a charter for a company to improve navigation as far west as Cumberland, Maryland.[38] Washington and Mason were both elected trustees of the new company, along with Johnson.[39] Like Washington, Mason was greatly interested in the Potomac route to the West and the exploration of the Ohio valley and had been an early participant in the Ohio Company of Virginia.[40] Washington and Mason worked closely with Johnson to draft a bill for the Maryland legislature to provide for its support of the project.[41] But political opposition in Maryland delayed progress. Johnson wrote to Washington that the Maryland Governor apparently believed that supporting the project would weaken Maryland's claim to jurisdiction

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[37] Delaplaine, *supra* note 30, at 69-70.

[38] 1772 Va. Acts c. XXXI, *reprinted in* 8 Hening's Statutes at Large 570 (1821). The legislation permitted the use of a lottery to raise funds. Among the managers appointed to oversee it were Benjamin Harrison and Patrick Henry. *Id.* Art. XII at 578.

[39] Delaplaine, *supra* note 30, at 77; 1 Rutland, *supra* note 20, at 222; Maryland Gazette, Nov. 3, 1774 (announcement by John Balledine identifying Washington, Mason and Johnson as trustees).

[40] Mason had become a partner in the Ohio Company in 1749 and was elected its permanent treasurer in 1751. *See generally* 1 Rutland, *supra* note 20, at cxiv, 3-10.

[41] Delaplaine, *supra* note 30, at 82-83; *see also* 1 Rutland, *supra* note 20, at 221.

over the River.[42] The Maryland Proprietary Government disbanded in April 1774, and the War of Independence prevented the project from proceeding further at that time.[43]

Resurgence of Interest in the Potomac Route to the West

Following the peace of September 1783, there was a resurgence of interest in improving the Potomac route to the West. In November 1783, Charles Beatty and Normand Bruce, friends of Johnson, reported to the Maryland General Assembly that, for the cost of $92,000 and in two years, obstructions to navigation by light vessels could be removed from the River between Fort Cumberland and the Great Falls.[44] The legislature took no action at that time but, as one nineteenth century Maryland historian observed, "the people discussed the subject with much animation and interest among themselves and in the public press."[45]

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[42] Johnson wrote to Washington on May 10, 1772 that "I fear our Governor is still under an impression that a concurrence by our Assembly in a scheme with yours for clearing Potowmack may weaken the proprietary claim of jurisdiction over that River and consequently that he is not at liberty to assent to such Bill tho' I believe in his own judgment clearing the River is an object which deserves immediate attention and that he wishes to see it effected." Delaplaine, *supra* note 30, at 73.

[43] Washington later wrote to Thomas Jefferson about the failure of this earlier project, stating that the plan "was in a tolerably train when I set out for Cambridge in 1775, and would have been in an excellent way had it not been for the difficulties which were met with in the Maryland Assembly; from the opposition which was given (according to report) by the Baltimore Merchants; who were alarmed, and perhaps not without cause, at the consequence of Water transportation to George Town of the produce which usually came to their Market." 27 John C. Fitzpatrick, *The Writings of George Washington* 373, 374 (1938) (Letter from Washington to Jefferson of 3/29/1784) [hereinafter "27 Fitzpatrick"]; Delaplaine, *supra* note 30, at 83, 386. John Balledine, a lead subscriber of the company, published a notice in the Virginia Gazette in October 1775 attributing the failure of the project to the "the Necessity of a Maryland Act of Assembly co-operating with one passed in Virginia, and which I have not yet been able to obtain. . . ." Virginia Gazette, Oct. 28, 1775.

[44] Scharf, *supra* note 22, at 519; Delaplaine, *supra* note 30, at 385.

[45] Scharf, *supra* note 22, at 519.

Meanwhile, Thomas Jefferson wrote to Washington urging that he take the lead in developing the Potomac route to the West, stating that this would "pour into our lap the whole commerce of the Western world."[46] Washington replied in March 1784 that he supported the idea, suggesting that Jefferson speak with Thomas Johnson.[47] However, Congress dispatched Jefferson to Paris in May 1784, along with Benjamin Franklin and John Adams.[48] Jefferson "consequently was unable to cooperate with Washington and Johnson in connection with the Potomac project."[49]

In September 1784, Washington witnessed James Rumsey's successful demonstration of a mechanical boat (the predecessor to Rumsey's steam boat) on the Potomac River in Berkeley County, Virginia (now West Virginia).[50] Washington noted in his diary that this invention "convinced" him that "it might be turned to the greatest possible utility in inland Navigation. . . ."[51] On his journey home, Washington made particular note of those portions of the North Branch of the Potomac River where the navigation could be improved.[52] Washington concluded: "The more then the Navigation of Potomack is investigated, and duly considered, the greater the advantages arising from them appear."[53]

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[46] Delaplaine, *supra* note 30, at 385-86.

[47] 27 Fitzpatrick, *supra* note 43 at 373; Delaplaine, *supra* note 30, at 386-87.

[48] Delaplaine, *supra* note 30, at 387.

[49] *Id.*

[50] 2 John C. Fitzpatrick, *The Diaries of George Washington* 283 (1925) [hereinafter "2 Fitzpatrick, *The Diaries of George Washington*"]; Delaplaine, *supra* note 30, at 387-88.

[51] 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 50, at 283.

[52] *Id.* at 284, 308, 310-11, 318.

[53] *Id.* at 318.

Concurrent Legislation: December 1784-January 1785

Upon his return from the "Western country" in October 1784, Washington wrote to the Virginia Governor, Benjamin Harrison, urging him to place before the General Assembly a plan to survey the Potomac and the James Rivers with a view to encouraging private venturers to open the route west.[54] As to the Potomac River plan, he suggested that Virginia obtain "the concurrence of Maryland."[55] Washington also pointed out the importance of Rumsey's invention, explaining:

> I consider Rumsey's discovery for working Boats against stream, by mechanical powers (principally) as not only a very fortunate invention for these States in general, but as one of those circumstances which have combined to render the present epocha favourable above all others for fixing, if we are disposed to avail ourselves of them, a large portion of the trade of the Western Country in the bosom of this State irrevocably.[56]

Harrison laid Washington's letter before the Virginia legislature.[57] Shortly thereafter, a group of interested citizens petitioned the legislatures of both Virginia and Maryland to pass an act of incorporation for a company.[58] News of the project circulated in the public press.[59]

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[54] 27 Fitzpatrick, *supra* note 43, at 471-80 (Letter from Washington to Harrison of 10/10/1784). Washington began by explaining that "it has been long my decided opinion that the shortest, easiest, and least expensive communication with the invaluable and extensive Country back of us, would be by one, or both of the rivers of this State which have their sources in the Appalachian mountains. . . ." *Id.* at 472.

[55] *Id.* at 478.

[56] *Id.* at 480. Washington had written the same language in his diary earlier in October. 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 43, at 327-28.

[57] 27 Fitzpatrick, *supra* note 43, at 480 n.56.

[58] *Id.* Washington also sent a copy of the petition to Johnson. Delaplaine, *supra* note 30, at 389.

[59] *See* Virginia Journal, Nov. 25, 1784 (describing meeting "of the Gentlemen of this State and Maryland . . . to deliberate and consult on the vast, great, political and commercial

(continued . . .)

On December 13, 1784, the Virginia House of Delegates appointed a committee consisting of Washington, Horatio Gates, and Thomas Blackburn, to travel to Annapolis to meet with Maryland representatives.[60] Washington and Gates departed for Annapolis, where Gates fell ill, and "the entire matter rested on Washington."[61]

On December 22, 1784, Washington met with a committee of the Maryland General Assembly to discuss the proposal.[62] Washington chaired the meeting.[63] Also participating were

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Object, *the rendering navigable the River Potomack from Tide Water*. – It was unanimously Resolved, That every possible Effort ought to be exerted to render these Waters navigable to their utmost sources. In consequence Petitions to the respective Honorable Assemblies were prepared praying to form a Company, with such Immunities as might seem meet to them to grant. . . . The opening of the Navigation of Potomack is, perhaps, a Work of more political than commercial Consequence, as it will be one of the grandest Chains for preserving the federal Union, the Western World will have free Access to us, and we shall be one and the same People, whatever System of European Politics may be adopted.—In short, it is a Work so big, that the intellectual Faculties cannot take it at a View.").

[60] *Journal of Virginia House of Delegates* (1784), *supra* note 29, at 65; 27 Fitzpatrick, *supra* note 43, at 480 n.56; Delaplaine, *supra* note 30, at 390.

[61] 27 Fitzpatrick, *supra* note 43, at 480 n.56. Washington wrote from Annapolis to the Marquis de Lafayette that he was there "at the request of the Assembly of Virginia, to fix matters with the Assembly of this State respecting the extension of the inland navigation of Potomac, and the communication between it and the Western waters; and hope a plan will be agreed upon to the mutual satisfaction of both States, and to the advantage of the Union at large." 28 John C. Fitzpatrick, *The Writings of George Washington* 17 (1938) (Letter from Washington to Lafayette of 12/23/1784) [hereinafter "28 Fitzpatrick"]. Shortly before, Washington had written to Richard Henry Lee, on the occasion of his election as president of the Congress, stating: "The Assemblies of Virginia and Maryland have now under consideration the extension of the inland navigation of the rivers Potomac and James, and opening a communication between them and the Western waters: they seem fully impressed with the political as well as the commercial advantages which would result from the accomplishment of these great objects; and I hope will embrace the present moment to put them in train for speedy execution." *Id.* at 11 (Letter from Washington to Lee of 12/14/1784).

[62] Report of the Commissioners of Virginia and Maryland (January 22, 1785), *reprinted in* Sen. Doc. 610, 26th Cong., 1st Sess. 74-75 (1840).

[63] *Id.* at 74

Thomas Stone and Samuel Chase,[64] two of the Maryland commissioners who had been appointed in 1777 (and would be appointed again shortly) to negotiate with Virginia over the jurisdiction of the Potomac and Pocomoke Rivers and the Chesapeake Bay. The group prepared a "conference report" which stated, in relevant part:

> That it is the opinion of this conference, that the removing the obstructions in the river Potomac, and the making the same capable of navigation from tide water, as far up the north branch of the said river as may be convenient and practicable will increase the commerce of the Commonwealth of Virginia and State of Maryland, and greatly promote the political interests of the United States, by forming a free and easy communication and connexion with the people settled on the western waters, already very considerable in their numbers, and rapidly increasing from the mildness of the climate and the fertility of the soil.
>
> That it is the opinion of the conference, that the proposal to establish a company for opening the river Potomac, merits the approbation of, and deserves to be patronized by Virginia and Maryland, and that a similar law ought to be passed by the legislature of the two governments, to promote and encourage so laudable an undertaking.[65]

The Maryland General Assembly promptly enacted a law providing for the creation of the Potomac Company, "to be of no effect, unless an act shall be passed by the legislature of Virginia upon similar principles."[66] Maryland pledged to subscribe fifty shares in the Company if Virginia agreed to do so.[67]

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[64] *Id.*

[65] *Id.* at 74. The conference also suggested that Virginia's earlier 1772 law "'for opening and extending the navigation of the river Potomac from Fort Cumberland to tide water,' ought to be repealed." *Id.* *See supra* note 38.

[66] 1784-85 Md. Acts c. XXXIII, § XXI.

[67] *Id.* § XX.

Washington submitted the conference report to the Virginia General Assembly by letter dated December 28, 1784, together with a copy of the Potomac Company legislation passed by the Maryland General Assembly.[68] Washington noted his belief that the Maryland legislators were "impressed with the importance of accelerating the purpose of the Legislature of Virginia of opening a free and easy intercourse with the Western territory, and for the extension of inland Navigation; and, that, there has been a perfect accordance of Sentiment in the Legislature of the State."[69]

In the meantime, the Virginia General Assembly was already moving forward with the effort. Concerned that the ultimate success of the Potomac route west would depend on cooperation from the State of Pennsylvania, the Virginia legislature voted on December 28, 1784, to amend the authorization of the commissioners appointed the previous June (Mason, Madison, Randolph and Henderson), instructing them to open a dialogue with Pennsylvania about their plans "to promote the clearing and extending the navigation of the Potowmack from tide water upwards as far as the same may be found practicable, to open a convenient road from the head of such navigation to the waters running into the Ohio, and to render these waters navigable as far as may be necessary and proper," and seeking Pennsylvania's support.[70] If a "joint representation" was not possible, the legislature directed that "any two" of the Virginia

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[68] 28 Fitzpatrick, *supra* note 61, at 20-22 (Letter from Washington to Virginia General Assembly of 12/28/1784).

[69] *Id.* at 22.

[70] *Journal of Virginia House of Delegates* (1784), *supra* note 29, at 86.

commissioners "themselves make such representations on the subject to the State of Pennsylvania, as will in such event become proper."[71]

The Virginia General Assembly approved the Potomac Company legislation on January 5, 1785,[72] and subscribed fifty shares on behalf of the Commonwealth.[73] Washington informed Samuel Chase on January 17, 1785.[74] That same day, he wrote to Thomas Johnson (who continued his involvement in the venture),[75] in order to expedite the opening of subscriptions for the Company, which were scheduled to begin February 8, 1785, in Richmond, Alexandria and Winchester, Virginia,[76] and in Annapolis, "George-Town" and "Frederick-Town," Maryland.[77]

The founding of the Potomac Company was publicized in the newspapers of the day,[78]

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[71] *Id.*

[72] *Id.* at 104; Delaplaine, *supra* note 30, at 391; 1784-85 Va. Acts c. XLIII, *reprinted in* 11 Hening's Statutes at Large 510 (1823). The legislation also provided for the repeal of Virginia's previous 1772 Act. *Id.* § XXI.

[73] *Id.* § XX. The Virginia legislature also bestowed 50 shares of the Potomac Company (and 100 shares of the James River Company) on George Washington as a grateful tribute for his service to the country. 1784-85 Va. Acts c. XLIV, *reprinted in* 11 Hening's Statutes at Large 525 (1823). Washington declined to accept personally any such emolument as the result of work that he believed to be his public duty. 28 Fitzpatrick, *supra* note 61, at 303-04 (Letter from Washington to Henry of 10/29/1785); 2 Fitzpatrick, *The Diaries of George Washington, supra* note 50, at 376 & n.4. The General Assembly directed that the shares be appropriated to "such objects of a public nature" as Washington might direct by deed or last will and testament. 1785-86 Va. Acts c. XI, *reprinted in* 12 Hening's Statutes at Large 42 (1823).

[74] 28 Fitzpatrick, *supra* note 61, at 32 (Letter from Washington to Chase of 1/17/1785).

[75] Delaplaine, *supra* note 30, at 391.

[76] 28 Fitzpatrick, *supra* note 61, at 31 (Letter from Washington to Johnson of 1/17/1785).

[77] 1784-85 Md. Acts c. XXXIII § 2; *see* Maryland Journal, Feb. 12, 1785 (giving notice that the books have been opened and subscriptions will be received through May 10, 1785).

[78] Maryland Journal, Feb. 18, 1785 (announcing opening of subscriptions for the company stock "so essentially necessary to accomplish a Work fraught with such universal

(continued . . .)

and the shares were quickly subscribed.[79] At its first organizational meeting on May 17, 1785, Washington was elected President of the Potomac Company, and Johnson was elected one of its four directors.[80] Thomas Stone and the Jenifer family were among the investors in the Company.[81]

The Mount Vernon Conference: March 1785

While the Potomac Company project was proceeding, the Maryland General Assembly on January 16, 1785 appointed Thomas Johnson, Samuel Chase, Thomas Stone and Daniel of St. Thomas Jenifer as Maryland's commissioners to meet with the Virginia commissioners who had been appointed the preceding June.[82] Maryland directed the commissioners "to meet the commissioners appointed by the Commonwealth of Virginia, for the purpose of settling the navigation of, and jurisdiction over, that part of the Bay of Chesapeake which lies within the

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Advantages"); Virginia Journal, Mar. 10, 1785 (describing plans to "open and extend the navigation of the River Potomack . . . from the highest part of the North Branch, that has water sufficient, to the Great Falls in three years, and be completed from thence to tide-water in ten years. . . ."); Virginia Journal, Mar. 17, 1785 (same).

[79] *See* 2 Fitzpatrick, *The Diaries of George Washington, supra* note 50, at 376 (noting that, as of May 17, 1785, the shares subscribed were "more than sufficient to constitute the Company. . . ."). Johnson's biographer wrote: "While the people had been impoverished by the War for Independence, the wealthier men on both sides of the Potomac purchased stock when they heard that the corporation was endorsed by such men as General Washington and Governor Johnson. Among the Marylanders who purchased stock in the Company were members of the best families in the State, including many of the relatives and personal friends of Governor Johnson. Among the Virginians who subscribed was John Marshall, who voted for the charter in the House of Delegates at Richmond." Delaplaine, *supra* note 30, at 391.

[80] 2 Fitzpatrick, *The Diaries of George Washington, supra* note 50, at 376-77.

[81] Jean B. Lee, *The Price of Nationhood: the American Revolution in Charles County* 227 (1994). Stone was Jenifer's nephew. Jean B. Lee, *In Search of Thomas Stone, Essential Revolutionary*, 92 Maryland Hist. Mag. 285, 295 (1997).

[82] Scharf, *supra* note 22, at 530; 1784-85 Md. Acts, Resolution 12.

limits of Virginia, and over the rivers Patowmack and Pocomoke; and that the said commissioners, or any two of them, have full power, in behalf of this state, to adjust and settle the jurisdiction to be exercised by the said states respectively, over the said waters and the navigation of the same. . . ."[83] Maryland proposed that the meeting take place on March 21, 1785, at Alexandria, Virginia.[84]

Thomas Stone wrote to Washington on January 28, 1785, stating his expectation that the upcoming conference would be successful, following as it did on the heels of the Potomac Company legislation:

> It gives me much pleasure to know that our act [of Maryland] for opening the navigation of Potomack arrived in time to be adopted by the Assembly of Virginia. If the scheme is properly executed I have the most sanguine expectation that it will fully succeed to the wishes of those who are anxious to promote the wellfare [sic] of these States and to form a strong chain of connection between the western and Atlantic [state] governments. Mr. Jenifer, Johnson, Chase and myself are appointed commissioners to settle the jurisdiction and navigation of the bay and rivers Potomack and Pocomoke with the commissioners of Virginia. We have also instructions to make application to Pennsylvania for leave to clear a road from Potomack to the western waters. Our Assembly proposes the meeting of the commissioners to be on the 21st of March at Alexandria if agreeable to the commissioners of Virginia. I have no doubt but the subjects of our mission will be settled to mutual satisfaction.[85]

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[83] 1784-85 Md. Acts, Resolution 12.

[84] *Id.*

[85] John M. Wearmouth, *Thomas Stone National Historic Site, Historic Resource Study* 47-48 (1988) (alterations in original). Stone further expressed his desire to visit General Washington at Mt. Vernon on the occasion of this conference. *Id.* at 48.

In the weeks preceding the conference, Washington was fully occupied at work on the Potomac Company, seeking investors and attempting to hire a skilled engineer.[86] Some biographers describe Washington as being somewhat obsessed about the project at this time.[87]

Washington recorded in his diary that Major Jenifer joined him for dinner at Mt. Vernon on Sunday, March 20, after which Washington sent his carriage "to take Colo. Mason to a meeting of comrs. at Alexandria for settling the jurisdiction of Chesapeake Bay and the rivers Potomac and Pokomoke between the States of Virginia and Maryland. . . ."[88]

However, the Virginia commissioners were not aware of the date for the meeting.[89] Mason later reported that "I shou'd not have known that I was one of the Persons appointed, had I not by mere Accident, two or three Days before the Meeting, been inform'd of it, by a Letter

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[86] Washington wrote to Jefferson in Paris on February 25, 1785, enclosing a copy of the legislation. 28 Fitzpatrick, *supra* note 61, at 77-81 (Letter from Washington to Jefferson of 2/25/1785). Washington inquired if "the monied men of France, Holland, England or any other Country with which you may have intercourse, might be induced to become Adventurers in the Scheme." *Id.* at 79. He also sought Jefferson's assistance in locating an engineer for the project. *Id. See also id.* at 48, 50 (Letter from Washington to Morris of 2/1/1785); *id.* at 81, 84-85 (Letter from Washington to Fairfax of 2/27/1785). As it turned out, the subscriptions "filled very fast," *id.* at 184 (Letter from Washington to Fairfax of 6/30/1785), and no foreign investment was required, *id.* at 278 (Letter from Washington to Jefferson of 9/26/1785).

[87] *See, e.g.*, Irving, *supra* note 30, at 630-31 (describing experience of Elkanah Watson, who visited Washington at Mt. Vernon in the Winter of 1785, and reported that Washington "modestly waived all allusions to the events in which he had acted so glorious and conspicuous a part. Much of his conversation had reference to the interior country and to the opening of the navigation of the Potomac by canals and locks, at the Seneca, the Great and Little Falls. His mind appeared to be deeply absorbed by that object, then in earnest contemplation."). Washington's diary shows that Mr. Watson visited Mt. Vernon on January 19, 1785. 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 50, at 336 & n.5.

[88] 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 50, at 352.

[89] 2 Rutland, *supra* note 1, at 813.

from two of the Maryland Commissioners."[90] After waiting a short time in Alexandria for Randolph and Madison to arrive, Mason and Henderson concluded that the other commissioners were unaware of the meeting date and that further delay was unwarranted.[91]

Not wanting to disappoint the Maryland commissioners, "who appeared to have brought with them the most amicable Dispositions, and expresss'd the greatest Desire of forming such a fair & liberal Compact, as might prove a lasting Cement of Friendship between the two States,"[92] Mason and Henderson accepted General Washington's invitation, "adjourned to Mount-Vernon, and finished the Business there."[93] Thus, the commissioners for Virginia were Mason and Henderson.[94] The commissioners for Maryland were Stone, Chase and Jenifer.[95] Washington's diary reflects that these distinguished gentlemen convened from Friday, March 25, through Monday, March 28.[96]

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[90] *Id.* at 836 (Letter from Mason to Madison of 12/7/1785).

[91] *Id.* at 826 (Letter from Mason to Madison of 8/9/1785).

[92] *Id.* at 827.

[93] *Id.*

[94] The Virginia resolution of June 1784 had authorized action by "any three" of the four commissioners appointed. *Journal of Virginia House of Delegates* (1784), *supra* note 29, at 84. The Virginia resolution of December 28, 1784, concerning the Pennsylvania communication, authorized action by "any two" of the Virginia representatives. Journal of the Assembly, *reprinted in* 2 Rowland, *supra* note 1, at 73. Mason and Henderson did not have a copy of the June 1784 appointment, and thus assumed from the December 28 resolution that two or more commissioners were empowered to act. 2 Rutland, *supra* note 1, at 827 (Letter from Mason to Madison of 8/9/1785).

[95] It is not clear why Thomas Johnson – the long-time Maryland supporter of the Potomac navigation project – did not attend. *E.g.*, Kate Mason Rowland, *The Mount Vernon Convention*, XI The Penn. Magazine of History and Biography 410, 415 (1887).

[96] 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 50, at 354. Washington's diary for Tuesday, March 29, reported that "Major Jenifer, Mr. Stone and Mr. Henderson went away before breakfast & Col. Mason (in my carriage after) it. . . ." *Id.*

The commissioners produced a 13-article Compact, now referred to as the "Compact of 1785" or the "Mt. Vernon Compact."[97] Consistent with the previous direction of their legislatures, they also issued a joint communication to the Commonwealth of Pennsylvania.[98] With minor differences in punctuation, that communication tracked the text of the December 28, 1785 Virginia resolution, advising Pennsylvania of the Maryland-Virginia plans "to promote the clearing & extending the Navigation of Potomack, from tide-Water, upwards, as far as the same may be found practicable," and seeking its cooperation and support.[99]

Most of the thirteen articles of the Compact were quoted or paraphrased at length by the Supreme Court in *Wharton v. Wise*, 153 U.S. 155, 163-66 (1894), in which the Court upheld the validity of the Compact. The Court observed that "[t]he provisions of the compact were well designed to promote the peace, good neighborhood, and welfare of both States, and facilitate intercourse between their citizens. . . ." *Id.* at 166.

Many of the articles involved the regulation of commerce, shipping and trade. This was necessary because, under the Articles of Confederation then in place, there was no federal superintendence over interstate commerce. *Id.* at 166-67. Maryland's commissioners prevailed

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[97] Compact of 1785, 1785-86 Md. Acts c. I, 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823); *see also* 2 Rutland, *supra* note 1, at 815-21 (reprinting text).

[98] 2 Rutland, *supra* note 1, at 822-23. Mason later recounted that General Washington had a copy of the December resolution "respecting the Application to be made to the Government of Pennsylvania, which he very obligingly gave us. . . ." *Id.* at 826 (Letter from Mason to Madison of 8/9/1785).

[99] *Compare* 2 Rutland, *supra* note 1, at 822-23 (text of Pennsylvania communiqué) *with Journal of Virginia House of Delegates* (1784), *supra* note 29, at 86 (directions to commissioners).

in receiving, in Article I of the Compact, Virginia's pledge to disclaim the right to impose tolls or charges on vessels sailing to or from Maryland through the Capes of Chesapeake Bay.[100]

Article VII, of central relevance in this case, provided:

> [T]he citizens of each State, respectively, shall have full property in the shores of Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States; provided, that such common right be not exercised by the citizens of the one State to the hindrance or disturbance of the fisheries on the shores of the other State; and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other.[101]

Article VI provided:

> The river Potowmack shall be considered as a common highway, for the purpose of navigation and commerce to the citizens of Virginia, and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.[102]

Article VIII provided:

> All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any

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[100] Compact of 1785, art. I, 1785-86 Md. Acts c. I, 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823).

[101] This was the language quoted by the Supreme Court, *Wharton*, 153 U.S. at 164. There were minor formatting, punctuation and capitalization differences between the versions of the Compact adopted by Maryland and Virginia. *Compare* 1785-86 Md. Acts c. I *with* 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823). None of those differences is material here.

[102] Compact of 1785, art. VI, 1785-86 Md. Acts c. I, 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823).

> other obstruction thereto, shall be made with the mutual consent and approbation of both States.[103]

Article XII of the Compact provided:

> The citizens of either state having lands in the other, shall have full liberty to transport to their own state the produce of such lands, or to remove their effects, free from any duty, tax or charge whatsoever, for the liberty to remove such produce or effects.[104]

Articles X and XI provided for concurrent criminal and civil jurisdiction by the States over, *inter alia*, the Potomac River, and for service of process on "*any part*" of the River.[105]

Finally, Article XIII of the Compact provided for the articles to be laid before the legislatures of both Maryland and Virginia and, upon ratification, "never to be repealed, or altered, by either, without the consent of the other."[106]

On November 17, 1785, the Maryland commissioners submitted to the Maryland legislature the Compact and their joint communication to Pennsylvania relating to clearing and extending the navigation of the Potomac River.[107] Maryland ratified the Compact on November 21, 1785,[108] as its first piece of legislation for the 1785-1786 session of the General Assembly.[109] The Maryland legislature added the following language, making the Compact forever binding and not subject to repeal or amendment without the consent of the government of Virginia:

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[103] *Id.* art. VIII.

[104] *Id.* art. XII.

[105] *Id.* art. X, XI (emphasis added).

[106] *Id.* art. XIII.

[107] Scharf, *supra* note 22, at 531.

[108] Scharf, *supra* note 22, at 531-32.

[109] 1785-86 Md. Acts c. I.

> That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the Commonwealth of Virginia, thereupon, and immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this state and the citizens thereof, and shall be for ever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this state is hereby solemnly pledged and engaged to the general assembly of the commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by this legislature of this government, without the consent of the government of Virginia.[110]

Thomas Stone wrote to General Washington on December 10, 1785, informing him that the Mount Vernon Compact was ratified without dissent in either House.[111]

The Virginia legislature ratified the Compact on January 3, 1786.[112] The Virginia version contained a similar enactment clause pledging that the Compact would never be repealed or altered by the legislature of Virginia "without the consent of the state of Maryland."[113]

The Unresolved Boundary Disputes

The Compact did not settle any of the complex boundary issues between Virginia and Maryland, but rather "left the question of boundary open to long continued disputes." *Marine Railway & Coal Co. v. United States*, 257 U.S. 47, 64 (1921). Those disputes concerned not only whether the boundary line was on the north or south bank of the Potomac River, but also the location of the boundary extending across the Chesapeake Bay and Eastern Shore to the Atlantic,

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[110] 1785-86 Md. Acts c. 1 § 2.

[111] Wearmouth, *supra* note 85, at 53.

[112] *Journal of Virginia House of Delegates* (1784), *supra* note 29, at 128.

[113] 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823).

the location of the "first fountain"[114] of the Potomac River (Maryland contending at times that it was on the South Branch; Virginia contending it was the North Branch), and the Western boundary running north from the first fountain of the Potomac to the Pennsylvania state line (the "Deakins Line" versus the "Michler Line").[115]

The Black-Jenkins Award of 1877

Between 1795 and 1874, various unsuccessful efforts were mounted by Virginia and Maryland to appoint commissioners to resolve these disputes. *See Maryland v. West Virginia*, 217 U.S. 1, 31-37 (1910).[116] The most serious efforts to resolve the boundary controversies occurred in 1872 and 1873, when commissioners appointed by both States met on numerous occasions and took depositions of various residents in the disputed lands on the Eastern Shore.[117]

The Maryland Commissioners submitted a lengthy report about their efforts to the Maryland Governor, William Pinkney Whyte, on December 30, 1873.[118] Both the Maryland Commissioners and the Virginia Commissioners prepared formal statements of their respective

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[114] As noted above, the charter to Lord Baltimore defined the south-western boundary of the province to run from the "first fountain" of the Potomac River. *Maryland v. West Virginia*, 217 U.S. 1, 25 (1910).

[115] For a helpful short history of Maryland's boundary disputes, *see* Carl N. Everstine, *The Potomac River and Maryland's Boundaries*, 80 Maryland Historical Magazine 355 (1985) [hereinafter "Everstine, *Maryland's Boundaries*"]; Brief on Behalf of West Virginia, *supra* note 14, at 58-76.

[116] *See also* Brief on Behalf of West Virginia, *supra* note 14, at 58-76; Everstine, *Maryland's Boundaries*, *supra* note 115, at 357-66.

[117] *See* Commission (Maryland) on Boundary Lines between Virginia and Maryland (1870-1874), *supra* note 13.

[118] *Id.* at 3-34.

positions.[119] As to the Potomac River, the Virginia Commissioners had insisted on a boundary line on the north shore.[120] By contrast, the Maryland Commissioners proposed a boundary line at the low-water mark on the Virginia shore, while recognizing Virginia's right to build wharves and improvements from the shoreline.[121] Their proposed boundary followed along the Virginia shore "to all wharves and other improvements, now extending, or which may hereafter be extended, by authority of Virginia," and then "around said wharves and other improvements to low water-mark on the southwestern side thereof."[122]

The Commissioners were unable to resolve this or any of the other matters in dispute, however, and the negotiations broke down.[123] The Commissioners recommended that the controversy be referred to the Governors of the two states, "with power to them, in case of disagreement, to call in an umpire, whose decision shall be final."[124]

Following through on that proposal, Virginia and Maryland in 1874 authorized the matter of the "true line of boundary" to be submitted to binding arbitration, with the proviso that:

> [N]either of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them entered into in the year seventeen hundred and eighty-five, but that

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[119] *Id.* at 35-43 (Abstract of the Maryland Statement), 63-141 (Statement of the Maryland Case), 235-329 (Statement of the Virginia Case). The Commissioners had agreed to do this on May 9, 1872. *Id.* at 48.

[120] *Id.* at 19, 329.

[121] *Id.* at 53 (Journal of Proceedings for Oct. 4, 1872) (Statement of Isaac D. Jones, Commissioner for Maryland)); *see also id.* at 42 (Abstract of the Maryland Statement), 140 (Statement of the Maryland Case).

[122] *Id.* at 53.

[123] *Id.* at 60-62.

[124] *Id.* at 34.

> the same shall remain to and be enjoyed by the said states and the citizens thereof forever.[125]

Jeremiah S. Black of Pennsylvania, and William A. Graham of North Carolina, were selected as arbitrators with the power to appoint a third.[126] Black and Graham selected Charles A. Jenkins of Georgia.[127] Graham died in 1875 and was replaced by J.B. Beck of Kentucky.[128]

Maryland was represented in the arbitration by William Pinkney Whyte, whose term as Maryland's Governor had just ended, as well as by Isaac D. Jones, one of the three Maryland Commissioners in 1872-73 who had submitted the report on the boundary dispute to Governor Whyte.[129] Whyte and Jones submitted to the arbitrators Maryland's claim as to the "true boundary."[130] The description was the same as the one proposed by the Maryland Commissioners in 1873.[131]

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[125] 1874 Va. Acts c. 135; 1874 Md. Acts c. 247.

[126] *Id.*

[127] 1875 Va. Acts c. 48.

[128] *Id.*

[129] *See* William P. Whyte, Isaac D. Jones, *Boundary Line Between the States of Maryland and Virginia, Before the Hons. Jeremiah S. Black, William A. Graham, and Charles J. Jenkins, Arbitrators upon the Boundary Line between the States of Virginia and Maryland* 1 (June 26, 1874) [hereinafter "Whyte & Jones, *Boundary Line*"]; W. Pinkney Whyte, *Synopsis of Argument made by Mr. Pinkney Whyte, of Counsel for Maryland, Boundary Line Between the States of Maryland & Virginia, Before the Board of Arbitrators* (Aug. 26, 1876) [hereinafter "Whyte, *Synopsis of Argument*"]; W. Pinkney Whyte, Isaac D. Jones, *Evidence to Sustain the Claim of Maryland that the Charter to Lord Baltimore Granted to Him the Bed of the Potomac River, and All the Islands in It, to the South-Western Bank of that River* (1876) [hereinafter "Whyte & Jones, *Evidence*"].

[130] *See* Whyte & Jones, *Boundary Line*, *supra* note 129.

[131] *Compare id.* at 1 *with* Commission (Maryland) on Boundary Lines between Virginia and Maryland (1870-1874), *supra* note 13, at 53, 42, 140.

On January 16, 1877, the arbitrators issued their award, together with a lengthy opinion.[132] In the majority opinion, Black and Jenkins determined the boundary along the Potomac River to be at the low-water mark on the Virginia shore.[133] Beck agreed with that conclusion but dissented as to the location of the boundary line across the Chesapeake Bay and the Eastern Shore.[134]

In their opinion, the arbitrators based the Potomac River boundary determination on the 1632 charter from Charles I to Lord Baltimore.[135] While they found that the original charter called for the boundary to be at the high-water mark on the Virginia side,[136] they concluded that Virginia had acquired title to the low-water mark, as well as the right to use the River beyond the low-water mark, through a long history of prescription.[137] Virginia, they found, "did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon.'"[138] The arbitrators' opinion concluded:

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[132] Board of Arbitrators to Adjust the Boundary Line Between Maryland and Virginia: Opinions and Award of Arbitrators on the Maryland and Virginia Boundary Line (M'Gill & Witherow 1877).

[133] *Id.* at 15-16, 18. Black and Jenkins noted that Virginia had contended "for many years" that the boundary was on the Maryland shore or left bank of the River. *Id.* at 6. During the arbitration, Virginia's counsel also argued for an interpretation that would divide the River by a line running down the middle. *Id.*

[134] *Id.* at 33.

[135] *Id.* at 1-2, 7-8.

[136] *Id.* at 8.

[137] *Id.* at 15.

[138] *Id.* at 15-16 (quoting Compact of 1785, art. VII).

> Taking all together, we consider it established that Virginia has a proprietory right on the south shore to low water-mark, and, appurtenant thereto, has *a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership*, and which shall not impede the free navigation or other common use of the river as a public highway.
>
> To that extent Virginia has shown her rights on the river so clearly as to make them indisputable.[139]

The fourth and final clause of the "Black-Jenkins Award" provided that:

> Fourth. Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has *a right to such use of the river beyond the line of low-water mark* as may be necessary to the *full enjoyment* of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.[140]

Both states ratified the Award in 1878, and Congress gave its consent in 1879.[141]

***Wharton v. Wise*: the Supreme Court Affirms the Validity of the Compact**

Prior to 1894, it was uncertain whether the Compact of 1785 was invalid for lack of consent by Congress. Under Article Six of the Articles of Confederation, in effect in 1785, the States were forbidden from entering into any treaty, confederation or alliance without such consent. The Supreme Court considered this issue in *Wharton v. Wise*, 153 U.S. 156, 167-73 (1894). The Court concluded that Article Six did not apply to agreements between the States

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[139] *Id.* at 16 (emphasis added). The arbitrators specifically rejected the argument that, because Virginia had acquired title by prescription, Virginia's rights should be found to stop at the shore. *Id.* at 25-26.

[140] Black-Jenkins Award, 1878 Md. Acts c. 274, 1878 Va. Acts c. 246, Act of March 3, 1879, ch. 196, 20 Stat. 481, 482 (emphasis added).

[141] *Id.*

promoting the "free intercourse of their citizens," particularly where, as in the case of the Compact of 1785, Congress had not objected. *Id.* at 167. The Court also noted that both Maryland and Virginia had historically recognized the Compact to be "of obligatory force" upon them. *Id.* at 168. The Court found that, although the Constitution superseded those portions of the Compact concerning the regulation of interstate commerce, it did not forbid agreements or compacts between the states that were already in existence at the time the Constitution took effect. *Id.* at 171.

The Court further concluded that Congress' approval of the Black-Jenkins Award in 1879 served independently to validate the Compact of 1785. *Id.* at 172-73. The Court pointed out that, in calling for binding arbitration in 1874, both Maryland and Virginia agreed that nothing in the boundary determination would deprive either State or its citizens "of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year 1785, but that the same shall remain to and be enforced by the said states and the citizens thereof forever." *Id.* at 172 (quoting 1874 Va. Acts c. 135, 1874 Md. Acts c. 247). The Court held that Congress' ratification of the Black-Jenkins Award, "taken in connection with the conditions upon which the award was authorized, operated as an approval of the original compact, and of its continuance in force under the sanction of Congress." *Id.* at 173.

One other point in *Wharton v. Wise* warrants mention. Maryland's Attorney General explained in Maryland's brief that the purpose of Article VII, with respect to the common right of fishing, was to give both States equal rights in the Potomac River:

> The compact made between the two States to preserve their friendship and to promote their mutual prosperity should receive not a technical, but a fair and reasonable construction. Keeping this rule in view, it would seem to be clear from the language of the compact underlined above [referring to the common right of

> fishing in Article VII], that it was intended to place the two States and their citizens upon a footing of entire and perfect equality as to the right of fishing in the river.[142]

Maryland explained that the Compact was negotiated at a time when the boundary between the States was disputed, so that the fact that the boundary was later resolved by arbitration did not alter the States' respective rights and obligations under Article VII:

> To construe the compact correctly we must go back to the time when it was made. Then the boundary between the two States was unsettled and in dispute, and the claims of the State[s] were widely divergent. Therefore, the compact as to this right of fishery was not, by its terms, a grant of right by Maryland to Virginia, or by Virginia to Maryland, but an agreement by which common and equal rights of fishery were given and secured as well to Maryland as to Virginia. Could Maryland, at that time, while the territorial limits and jurisdiction of the two States were unsettled, and controverted, have reasonably claimed in the face of this language of the compact that she had a wider and more comprehensive right of fishing in the river than Virginia had?
>
> And if she could not then have fairly and properly made such claim, she cannot make it now, although her boundary is now settled, and the bed of the Potomac is now decided to be within her territory.[143]

Maryland v. West Virginia

West Virginia became a State out of a portion of the territory of Virginia on June 20, 1863. *See generally Virginia v. West Virginia*, 220 U.S. 1, 26 (1911) and *Virginia v. West Virginia*, 206 U.S. 290, 315 (1907) (providing history of the formation of the State of West Virginia). West Virginia was not a party to the arbitration resulting in the Black-Jenkins Award

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[142] Attorney General of Maryland, Brief of Appellant at 23, *Wharton v. Wise*, No. 1054 (U.S. 1893). This portion of Maryland's brief was quoted verbatim from a legal opinion given in December 1885 by I. Nevett Steele, Esq., to Governor Lloyd of Maryland. *Id.* at 5.

[143] *Id.* at 23-24.

of 1877. Accordingly, the boundary line between West Virginia and Maryland remained uncertain, not only as to the boundary along the Potomac River, but as to Maryland's western boundary running north from the first fountain of the Potomac River.

In 1891, Maryland filed suit in the Supreme Court to settle the controversy. *Maryland v. West Virginia*, 217 U.S. 1, 22 (1910). The principal matter in dispute related to the location of Maryland's western boundary line running north from the "first fountain" on the North Branch of the Potomac River to the Pennsylvania line, a dispute that involved overlapping territory in Preston County, West Virginia, and Garrett County, Maryland. *Id.* at 23. West Virginia argued for the long established "Deakins Line," surveyed in 1788, which was not a true meridian but, owing to the surveyor's compass, ran slightly to the northeast. *Id.* at 24, 34, 38-39. Maryland argued in favor of a true meridian, running due north, along the line surveyed by Lieutenant Michler in 1859. *Id.* at 32, 37.[144] The Court resolved this dispute in favor of West Virginia and the Deakins Line. *Id.* at 41-45.

West Virginia filed a cross-bill against Maryland in which it urged that Maryland's *southwestern* boundary with West Virginia be established along the Maryland shore of the Potomac River. *Id.* at 24. The Court rejected that argument based on its earlier decision in *Morris v. United States*, 174 U.S. 196 (1899). In *Morris*, the Court held that the heirs of James Marshall and Chief Justice John Marshall did not own title to property in the riverbed of the Potomac River adjacent to the District of Columbia. The Court ruled that those claims, deriving from the 1688 grant of the Northern Neck by James II to Lord Culpeper, were inferior to the

[144] The difference created an inverted triangle or wedge of disputed territory, the base of which was three-quarters of a mile in length along the Pennsylvania-Maryland line. 217 U.S. at 37.

earlier 1632 charter from Charles I to Lord Baltimore. 174 U.S. at 224-25. Based on *Morris*, the Court in *Maryland* v. *West Virginia* concluded that West Virginia's claim to a boundary on the north shore must fail. 217 U.S. at 45-46.

In a subsequent opinion, the Court ruled that the boundary line between Maryland and West Virginia should be at the low-water mark on the southern shore of the Potomac River, consistent with the Black-Jenkins Award. *Maryland* v. *West Virginia*, 217 U.S. 577, 580-81 (1910).[145] The Court quoted at length from the opinion of Black and Jenkins, including this portion: "'Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.'" *Id.* at 580 (quoting opinion).

The Court stated: "We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two states on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark." *Id.* at 580. The Court concluded that:

> [T]he privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.

Id. at 580-81. The Court pointed out that counsel for *both* Maryland and West Virginia had submitted proposed decrees preserving the "binding force" of the Compact of 1785. *Id.*

[145] The Court observed: "In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at low-water mark, along the southern bank of the Potomac river." *Id.* at 578.

The decree issued by the Court specifically incorporated those portions of the Compact of 1785 applicable to the Potomac River:

> [T]his decree shall not be construed as abrogating or setting aside the compact made between commissioners of the state of Maryland and the state of Virginia at Mount Vernon, on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland, and afterwards by act of the general assembly of Virginia, passed on the 3d day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the states of Maryland and West Virginia, so far as it is applicable to that part of the Potomac river which extends along the border of said states, as ascertained and established by this decree.

Id. at 585. This language was taken from the draft decree proposed by Maryland.[146]

Concurrent Legislation, *Virginia v. Maryland* (1957), and the Potomac River Compact of 1958

As noted above, Article VIII of the Compact of 1785 provided that "all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof . . . shall be made with the mutual consent and approbation of both States."[147] Prior to 1957, Maryland and Virginia enacted concurrent legislation concerning the Potomac River in a number of areas.[148]

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[146] Decree Proposed by the State of Maryland at 4-5, *Maryland v. West Virginia*, No. 1, Orig. (U.S. Apr. 20, 1910).

[147] Compact of 1785, art. 8, 1785-86 Md. Acts c. 1, 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823).

[148] *See generally* Carl N. Everstine, Research Division, Maryland Legislative Council, *Research Report No. 26: The Compact of 1785* at 5-6 (1946) (surveying various Maryland and Virginia legislation) [hereinafter "Everstine, *The Compact of 1785*"].

As to laws relating to the navigation of the Potomac, the States passed a variety of concurrent legislation relating to the operations of the Potomac Company (jointly chartered in 1785), and its successor, the Chesapeake and Ohio Canal ("C&O Canal") Company (jointly chartered in 1824-25).[149]

Maryland and Virginia also enacted numerous concurrent laws concerning the regulation of fish and oysters in the Potomac River. Typical of such laws was legislation passed in 1894, requiring that oysters taken from the Potomac River be culled on their natural beds, and prohibiting the culling of small oysters.[150] Both acts provided that they were not effective until adopted by the other State, and that nothing in the act abridged any rights under the Compact of 1785.[151] On other occasions, the States enacted concurrent legislation relating to freshwater fishing in the Potomac River above the Little Falls.[152]

In 1949, Maryland proposed amending the Compact of 1785 by adding fifteen new articles that would have created a bi-state commission to regulate the fin-fish, crab and oyster industry in the Chesapeake Bay and the "tidal waters of the Potomac River."[153] Virginia did not

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[149] 1824 Va. Acts c. 38, 1825 Md. Acts c. 79, Act of Mar. 3, 1825, ch. 25 Stat. 802 (1925). Many of those concurrent laws are reprinted in Sen. Doc. 610, 26th Cong., 1st Sess. (1840). While the C&O Canal was constructed along the Maryland shore of the River, Section 21 of the charter provided that "the right to the waters of the river Potomac, for the purpose of any lateral canal or canals which the State of Virginia or Maryland may authorize to be made in connection with the said canal, is reserved to the said States respectively. . . ." Sen. Doc. 610, 26th Cong., 1st Sess. 11-12 (1840).

[150] 1894 Md. Acts c. 63, 1894 Va. Acts c. 564.

[151] *Id.* §§ 6-7.

[152] 1896 Md. Acts c. 427; 1896 Va. Acts c. 627.

[153] 1949 Md. Acts c. 484.

agree to that proposal, however, and there followed another chapter in what some have dubbed the "Oyster Wars."[154]

On April 15, 1957, Maryland purported to repeal its 1785 law ratifying the Mt. Vernon Compact.[155] Maryland declared that the parts of the Compact concerning maritime matters and interstate trade had been superseded and rendered obsolete by the federal Constitution,[156] and that Virginia was allegedly not cooperating with Maryland in the enforcement of existing concurrent laws.[157] Maryland repealed its 1949 law proposing amendments to the Compact.[158] Maryland also amended its concurrent laws concerning fish, oysters and crabs in the Potomac River so as to delete those provisions recognizing Virginia's regulatory authority.[159]

Virginia responded by seeking leave in the Supreme Court to file an original action against Maryland to invalidate those 1957 laws and Maryland's unilateral abrogation of the Compact.[160] Virginia claimed that Maryland's actions seriously threatened the interests of Virginia's 800 fin-fish, crab and oyster fishermen in the Potomac River.[161]

The Court granted Virginia's motion and directed Maryland to answer. *Virginia v.*

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[154] *See, e.g.*, John Kobler, *They've Been Fighting 173 Years*, The Saturday Evening Post, Nov. 1, 1958, at 31, 73 ("The oyster war has been a major problem of every Maryland and Virginia administration since the birth of the nation.").

[155] 1957 Md. Acts c. 766.

[156] *Id.* recital 4.

[157] *Id.* recitals 8-10, 12.

[158] 1957 Md. Acts c. 767, *repealing* 1949 Md. Acts c. 484.

[159] 1957 Md. Acts c. 770.

[160] Motion for Leave to File Bill of Complaint and Bill of Complaint, *Virginia v. Maryland*, No. 12, Orig. (U.S. 1957).

[161] *Id.* at 12.

Maryland, 355 U.S. 269 (1957). While admitting in its Answer that "there have been many concurrent laws enacted over a long period of years" between the States,[162] Maryland sought nonetheless to declare the Compact invalid as lacking "mutuality" and being "unequitable."[163]

The Court appointed retired Justice Stanley F. Reed as Special Master. 355 U.S. 946 (1958). At his encouragement, the parties were able to settle the dispute amicably through the negotiation of a new compact, the Potomac River Compact of 1958 (or the "1958 Compact").[164] The 1958 Compact was adopted by both States and consented to by Congress in 1962.[165] It created the Potomac River Fisheries Commission, which continues in operation today.

The Potomac River Fisheries Commission is composed of three representatives each from Maryland and Virginia.[166] Its jurisdiction covers the tidal portion of the Potomac River from the mouth of the River (between Smiths Point and Point Lookout) to the boundary line crossing the River between Virginia and the District of Columbia.[167] The Commission prescribes regulations concerning "the type, size and description of all species of finfish, crabs, oysters, clams and other shellfish which may be taken or caught, within its jurisdiction, the places where they may be taken or caught, and the manner of taking or catching."[168] The Commission issues licenses to

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[162] Answer to Bill of Complaint at 6, *Virginia v. Maryland*, No. 12, Orig. (U.S. Feb. 19, 1958).

[163] *Id.* at 11.

[164] Final Report of Special Master at 3, *Virginia v. Maryland*, No. 12, Orig. (U.S. Dec. 10, 1962); *Virginia v. Maryland*, 371 U.S. 943 (1963).

[165] Potomac River Compact of 1958, 1958 Md. Acts c. 269, 1959 Va. Acts c. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962).

[166] *Id.* art. I, § 2.

[167] *Id.* art. II.

[168] *Id.* art. III, § 2.

citizens of Virginia and Maryland on equal terms, "[r]ecognizing that the right of fishing in the territory over which the Commission shall have jurisdiction is and shall be common to and equally enjoyed by the citizens of Virginia and Maryland," and making "no distinction" between them.[169]

The 1958 Compact specifically superseded the Compact of 1785 and provided that that compact "shall no longer have any force or effect."[170] However, the 1958 Compact also made clear that the rights protected under Article VII of the Compact of 1785 and Clause Four of the Black-Jenkins Award, including the right to erect wharves and other improvements, were to continue in full force and effect, and were not diminished by the new compact:

> The rights, *including the privilege of erecting and maintaining wharves and other improvements*, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be *neither diminished, restricted, enlarged, increased nor otherwise altered* by this compact, and the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.[171]

The Commissioners' joint report explained:

> Clause VII of the Compact of 1785 is reflected in Section 4 of Article 3 and in Section 1 of Article 7 of the new Compact and carries forward certain rights of the citizens of Maryland and Virginia *which have not been in controversy*.[172]

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[169] *Id.* art. III, § 4(a).

[170] *Id.* art. IX, § 1.

[171] *Id.* art. VII, § 1 (emphasis added).

[172] Report of the Commissioners to the Governors of Maryland and Virginia, *The Potomac River Compact of 1958, reprinted in* Virginia House Document No. 22, at 6 (1960) (emphasis added).

Maryland's authority to agree to the Potomac River Compact of 1958 was challenged by certain Maryland citizens in Maryland state court. However, the Maryland Court of Appeals rejected that attack in *Dutton v. Tawes*, 225 Md. 484, 171 A.2d 688 (1961). The Court of Appeals affirmed Maryland's authority to enter into the 1958 Compact as "a power inherent in sovereignty limited only by the requirement of Congressional consent under Art. I, Sec. 10, of the Constitution of the United States." *Id.* at 500, 171 A.2d at 696. The Court noted "that it has long been established that where the middle of a river *or one of the shores of the river* is a boundary between two states, these neighbors may establish concurrent jurisdiction over the whole river by compact." *Id.* at 500, 171 A.2d at 696 (emphasis added).

Maryland's Claim that Virginia's Compact Rights Do Not Apply Above Tidewater: *Binney's Case* and *Middlekauff*

On January 4, 2000, in connection with the controversy surrounding Maryland's refusal to issue a waterway construction permit to the Fairfax County Water Authority, the Attorney General of Maryland wrote a letter to the Attorney General of Virginia contending that Virginia's compact rights were inapplicable to the non-tidal reach of the Potomac River.[173] The Maryland Attorney General stated that his position was based on rulings of the Maryland Court of Appeals, "the highest court in this State."[174] As confirmed in Maryland's Brief in Opposition to Virginia's Motion for Leave to File Bill of Complaint at 22, Maryland relies on two cases for this proposition: the Maryland Court of Appeal's decision in *Middlekauff v. LeCompte*, 149 Md. 621,

[173] Bill of Complaint ¶ 44 (third sentence); Answer ¶ 44 (admitted).

[174] Virginia Appendix at 181a (filed 2/18/2000).

132 A. 48 (1926), and the decision of Maryland Chancellor Bland in *Binney's Case*, 2 Bland 99, 126 (1829).[175]

In *Binney's Case*, Chancellor Bland dismissed a number of legal attacks against the C&O Canal Company brought by one of its shareholders, Amos Binney. Binney held title to certain properties, individually and as trustee, on the Maryland shore of the Potomac River near Little Falls, partly in Maryland and partly in the District of Columbia, through which the canal was to be constructed. 2 Bland. at 110, 116. He contended that the Company's construction of a feeder dam across the River would destroy the landowners' ability to use the River for mill sites, either by preventing the use of water for mills or by creating rival sites that would compete for business. *Id.* at 112-13, 118. He also claimed that the Company was not authorized to expend funds for canal construction in the District of Columbia. *Id.* at 114, 140.

Chancellor Bland ruled that Binney was not entitled to an injunction to prevent the Company from constructing the feeder dam. He found that Binney's case was procedurally defective because Binney had sued the Company's President and Directors, but had failed to sue the Company itself, an indispensable party. *Id.* at 103, 105-07, 109. It was also procedurally defective because Binney had failed to name the property owners for whom he claimed to be a trustee. *Id.* at 105. Chancellor Bland ruled that Binney's claims were also flawed on the merits on numerous independent grounds.[176]

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[175] *Middlekauff* and *Binney's Case* were also mentioned by the Maryland Court of Appeals in *Barnes v. Maryland*, 186 Md. 287, 299, 47 A.2d 50, 55 (1946).

[176] Bland ruled that Binney could not enjoin construction, *inter alia*, because: (1) there were multiple property owners along the River, whereas "unless an individual owns the whole of that land, he cannot be considered as the owner of the mill-site." *Id.* at 116, 131; (2) Binney had no legal protection against the erection of competing mills, *id.* at 119; (3) the Company was

(continued . . .)

About half-way through the opinion, Bland considered the question of whether the Potomac River was navigable above the falls. *Id.* at 123-28. Why this issue had any relevance to the pending case was not clearly explained, but Binney apparently had argued that the River was, in fact, navigable and that the construction of the feeder dam across the River would have created a nuisance by impairing its navigation. The Company's charter, approved by Maryland and Virginia, and ratified by Congress,[177] explicitly authorized the Company to construct such dams as were deemed necessary.[178] Rather than pointing this out, however, Bland stated that, while the improved portion of the River above the falls was "a large navigable high-way, common to this state and its *southern* neighbor," *id.* at 123, the River in its original state was not navigable upstream of the falls. *Id.* at 123-24, 127-28. Bland also took the occasion (48 years before the Black-Jenkins Award) to opine that the River "belong[s] entirely to [Maryland]." *Id.* at 123; *see also id.* at 128 (stating that "the whole of the river, to its right bank, forms a part of the territory of the state of Maryland").

As to the Compact of 1785, Bland said:

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given the legal authority to condemn his property, if necessary, *id.* at 119-20; (4) Binney failed to show that the construction of the canal would diminish the water available for any mill site, *id.* at 121; and (5) Binney failed to show that the Company planned to establish any competing mill site, *id.* at 122. Bland also rejected Binney's attacks on the Company's authority to extend the canal into the District of Columbia on numerous grounds, none of which is relevant here. *Id.* at 140-66.

[177] 1824 Va. Acts c. 38, 1825 Md. Acts c. 79, Act of Mar. 3, 1825, ch. 25 Stat. 802 (1925).

[178] 1824 Va. Acts c. 38, § 4 (granting the Company's President and Directors the power "to cut canals, erect dams, open feeders, construct locks and perform such other works as they shall judge necessary or expedient for completing the canal. . . ."); 1825 Md. Acts c. 79 (confirming and accepting the Act of Virginia).

> It was urged, that whatever may be the natural character of this river, above tide; and however it may have been regarded before the year 1785; that the compact made between this state and Virginia, on the 28th of March of that year, has finally established its character, as a navigable river and highway, common to both states.
>
> The general scope and object of that compact was, not to fix and give a legal character to any natural subject whatever; in that respect it did not profess to alter, or to stipulate for anything; throughout it speaks of waters, which are by nature navigable; and regulates the terms and manner in which the natural navigation is to be conducted by the citizens of the contracting parties. The first nine articles cannot possibly be applied in any other way. . . . There is, therefore, nothing in this compact, which relates in any manner whatever to the river Potomac above tidewater.

Id. at 125-26.

This portion of Bland's opinion was adopted by the Maryland Court of Appeals in *Middlekauff*, where the court upheld a Maryland statute that prohibited the use of fish pots in non-tidal waters against a challenge from certain residents of Maryland and West Virginia. 149 Md. at 628, 132 A. at 50. The challengers contended that the statute was invalid under Article VIII of the Compact of 1785 because it had not been assented to by Virginia. *Id.* at 623, 132 A. at 49. The court rejected that argument, concluding that "the eighth clause taken alone, and read in full, seems to refer only to navigable waters," and that "the Compact as a whole seems to confirm this construction." *Id.* at 626, 132 A. at 50. In support, the court quoted the same excerpt from *Binney's Case* cited above. *Id.* at 627-28, 132 A. at 50.

UNDISPUTED MATTERS ENTITLING VIRGINIA TO PARTIAL SUMMARY JUDGMENT

Virginia seeks partial summary judgment on the question of whether its rights recognized under Article VII of the Compact of 1785 and under Clause Four of the Black-Jenkins Award, and reserved under Article VII of the Potomac River Compact of 1958, apply above the tidal

> to remove their effects, free from any duty, tax or charge whatsoever, for the liberty to remove such produce or effects.[184]

There was no suggestion in this provision that this right applied only to River crossings in the tidewater stretch of the River below Little Falls. Indeed, by 1785, there were numerous ferry crossings over the Potomac River between Maryland and Virginia in the non-tidal stretch above Little Falls.[185] There is no logical reason why the drafters of Article XII would have intended to deny this privilege to those citizens who chose to cross the Potomac River at those locations.

---

[184] Compact of 1785, art. XII, 1785-86 Md. Acts c. I, 1785-86 Va. Acts c. XVII, *reprinted in* 12 Hening's Statutes at Large 50 (1823).

[185] *See* Angus W. McDonald, *Report to Gov. Letcher [of Virginia]*, *reprinted in* 9 *The Historical Magazine and Notes & Queries Concerning the Antiquities, History & Biography of America* 13, 20-21 (1865) (listing ferry crossings and concluding: "It will thus be seen, up to the date of the ratification of the compact between Virginia and Maryland, as many as twenty-eight ferries had been established by acts of the legislature of Virginia, over the Potowmac river to Maryland, most of them below, and many above the flow of the tides."). The following ferry crossings were established across the Potomac River *above* Little Falls prior to 1785: 1755 Va. Acts c. XII, *reprinted in* 6 Hening's Statutes at Large 494 (1819) (establishing ferry crossing "from the land of Thomas Swearingen, in the county of Frederick, over Patomack river, to the land opposite thereto in the province of Maryland. . . ."); 1757 Va. Acts c. X, *reprinted in* 7 Hening's Statutes at Large 125 (1820) (establishing ferry crossing "[f]rom the land of Josias Clapham, in the county of Fairfax, over Potowmack river, to the land on either side the Monochisey creek, in the province of Maryland. . . ."); 1761 Va. Acts c. IX, *reprinted in* 7 Hening's Statutes at Large 401 (1820) (establishing ferry crossing "from the land of Robert Harper, in the county of Frederick, over Potowmack river, to his land on the opposite side, in the province of Maryland. . . ."); 1765 Va. Acts c. XXXII, *reprinted in* 8 Hening's Statutes at Large 146 (1821) (establishing ferry crossing "from the land of Thomas Shepherd, in the town of Mecklenburg [now Shepardstown], in the county of Frederick, over Potowmack river, to his land opposite thereto in the province of Maryland. . . ."), *repealed by* 1766 Va. Acts c. XLIII, *reprinted in* 8 Hening's Statutes at Large 263 (1821) (stating that ferry crossing was unnecessary because of existing crossing to Maryland from the land of Thomas Swearingen in Frederick county); 1769 Va. Acts c. XXV, *reprinted in* 8 Hening's Statutes at Large 368 (1821) (establishing ferry crossing "from the land of Benjamin Foreman, in Frederick county, over Potowmack river, to the land of the right honourable lord Baltimore, in Maryland. . . .; [and] from the land of Thomas Aubrey, in the county of Loudoun, across Potowmack river, to the land of James Hook, in Maryland. . . ."); 1772 Va. Acts c. XXVII, *reprinted in* 8 Hening's Statutes at Large 554 (1821) (establishing ferry crossing "from the land of the right honourable the earl of

(continued . . .)

Moreover, at the time the Compact was negotiated in March 1785, the General Assemblies of both States had recently chartered the Potomac Company to make improvements in the River to facilitate continuous navigation from tidewater as far up the North Branch of the Potomac as practicable. Although the work subsequently took longer than expected,[186] the legislatures in 1785 contemplated that the River would be made fully navigable from Great Falls to Cumberland within three years.[187]

Tankerville, in Loudoun county, in the tenure and occupation of John Farrow and Alexander Reame, over Potowmack river, to the opposite shore, in Maryland. . . ."); *see also* 2 Code of Virginia c. 237, § 8 (1819) (listing 61 ferry crossings over the Potomac River and its tributaries as of 1819); Penelope M. Osburn, *Seven Ferries Served Loudoun in 1700s*, The Loudoun-Times Mirror, Sep. 26, 1957 (identifying Edward's, Noland's, Myer's, Heater's, Smith's, Belt's and Berlin's ferries from Loudoun County to Maryland in the 1700s, and stating that "[t]he best known and most heavily traveled ferry was owned by Philip Noland and was in operation as early a[s] 1757. . . . Thomas Jefferson, in his account book, records crossing here on his first trip from Monticello to Philadelphia to attend the Continental Congress."); 2 Fitzpatrick, *The Diaries of George Washington*, *supra* note 50, at 402 (entry of Aug. 9, 1785, referencing crossing at "Knowland's Ferry"); 1 Fitzpatrick, *supra* note 31, at 511, 512 (Letter from Washington to Dinwiddie of 12/2/1756, referencing crossing at Swearingen's Ferry).

[186] By 1798, the Potomac Company had "removed most of the obstructions in the Patowmack river, from Savage river to tide water, except those at the Great Falls." 1797-98 Md. Acts c. XCIII, 1797-98 Va. Acts c. 3. The legislatures noted that "those now navigating the said river receive great benefit from the improvement of the navigation by the labour and expenditures of said company. . . ." *Id.* Accordingly, the legislatures permitted the Company to receive the tolls set forth in the charter, provided the Company pay for the transport of goods around the Great Falls. *Id.* By 1803, work on the locks at the Great Falls was completed and the legislatures declared that the purpose of the Company in "opening and extending the navigation of the river Patowmack, has been accomplished." 1802-03 Md. Acts c. LXXXIV *and* 1802-03 Va. Acts c. LXXV.

[187] 1784-85 Md. Acts c. XXXIII, § 28; 1784-85 Va. Acts c. XLIII, § 18, *reprinted in* 11 Hening's Statutes at Large 510 (1823); Virginia Journal, Mar. 17, 1785 ("It is stipulated that the work shall begin in one year after the Company is formed, and the River made navigable from the highest part of the North-Branch, that has water sufficient, to the Great Falls in three years, and be completed from thence to tide-water in ten years after the said Company is formed . . .").

Chronology of Selected Events
Related to the Mt. Vernon Compact of 1785 and its Progeny

April 10, 1606	First Charter to Virginia by James I
May 23, 1609	Second Charter to Virginia by James I
March 12, 1612	Third Charter to Virginia by James I
1632	Charter from Charles I to Cecilius Calvert, successor to Lord Baltimore, the second Baron of Baltimore and first Lord Proprietary of the province of Maryland
1649	Patent from Charles II to Lord Hopton for the "Northern Neck" between the Rappahanock and Potomac Rivers
1688	Confirmatory patent for the Northern Neck by James II to Thomas Lord Culpeper
1772	Virginia charters a company to improve the navigation of the Potomac River as far west as Cumberland, Maryland; George Washington and George Mason elected trustees
1772-April 1774	Thomas Johnson unsuccessfully seeks Maryland approval for the Potomac project; Maryland Proprietary Government disbanded
June 15, 1775	George Washington appointed Commander-in-Chief of the Continental Army
June 29, 1776	Virginia Constitution adopted; Article 21 cedes certain territories to neighboring states
July 4, 1776	American Declaration of Independence
October 1776	Maryland Constitutional Convention rejects Virginia "cession"
November 15, 1777	Continental Congress approves Articles of Confederation, subject to ratification by the States
December 1777-1778	Virginia and Maryland appoint commissioners "to adjust and confirm the rights of each to the use and navigation of, and jurisdiction over the Bay of the Chesapeake, and the rivers Potomac and Pocomoke;" Maryland delays ratifying Articles of Confederation, and War of Independence prevents further progress
March 1, 1781	Articles of Confederation in force upon ratification by Maryland
September 1783	Peace Treaty signed between Great Britain and the United States
November 1783	Beatty and Bruce report to Maryland General Assembly on feasibility of removing obstructions to navigation in the Potomac River
June 28, 1784	Virginia appoints commissioners (George Mason, James Madison, Edmond Randolph and Alexander Henderson) to meet with Maryland commissioners "to frame such liberal and equitable regulations concerning the said [Potomac] river, as may be mutually advantageous to the two States."
September 1784	Washington observes James Rumsey's vessel operate on the Potomac River
October 1784	Washington urges Virginia to charter a company to open the Potomac Route west

December 1784	Virginia appoints Washington and others to travel to Annapolis to promote the Potomac project; Washington meets with committee of Maryland General Assembly, including Samuel Chase and Thomas Stone, concerning charter for the Potomac Company; Maryland enacts charter for the Potomac Company, conditioned on approval by Virginia; Virginia amends its June 1784 appointment of commissioners, instructing them to communicate with Pennsylvania about the Potomac project
January 5, 1785	Virginia approves legislation to charter the Potomac Company and subscribes 5,000 shares
January 16, 1785	Maryland appoints commissioners (Thomas Johnson, Samuel Chase, Thomas Stone and Daniel of St. Thomas Jenifer) to meet with Virginia commissioners to "settle the jurisdiction to be exercised" over the Potomac and Pocomoke Rivers and the Chesapeake Bay
March 25-28, 1785	Conference of Virginia and Maryland commissioners (Chase, Stone, Jenifer, Mason and Henderson) at Mt. Vernon; Mt. Vernon Compact negotiated; joint communication sent to Pennsylvania concerning the Potomac project
May 17, 1785	Washington elected President of the Potomac Company
November 21, 1785	Maryland ratifies Mt. Vernon Compact
January 3, 1786	Virginia ratifies Mt. Vernon Compact; Virginia General Assembly later that month proposes meeting of commissioners from the various states to discuss "such commercial regulations [as] may be necessary to their common interest and their permanent harmony."
September 1786	Annapolis Convention; attendees issue report written by Alexander Hamilton proposing convention in Philadelphia the following May
May 25, 1787-September 17, 1787	Constitutional Convention in Philadelphia approves text of Constitution of the United States
March 4, 1789	Present United States government begins
December 3, 1789	Virginia cedes portion of territory to the United States to form the District of Columbia
1824	Chesapeake and Ohio Canal ("C&O Canal") Company chartered as successor to Potomac Company
1829	*Binney's Case*, 2 Bland 99 (1829)
July 9, 1846	United States returns territory to Virginia previously ceded for the District of Columbia
June 20, 1863	West Virginia becomes a State out of a portion of the territory of Virginia
1874	Following two years of unsuccessful negotiations, Maryland and Virginia submit the question of the "true line of boundary" to binding arbitration, provided that the rights under the Compact of 1785 "shall remain to and be enjoyed by the said states and the citizens thereof forever."

1874-1876	Arbitration proceedings before Jeremiah S. Black of Pennsylvania, Charles A. Jenkins of Georgia, and J.B. Beck of Kentucky (replacing William A. Graham of North Carolina)
January 16, 1877	Black-Jenkins Award and Opinion issued
1878	Virginia and Maryland ratify Black-Jenkins Award
March 3, 1879	Congress ratifies Black-Jenkins Award
1891	Maryland files suit against West Virginia to resolve boundary controversy
1894	Decision of Supreme Court in *Wharton v. Wise*, 153 U.S. 156 (1894)
1899	Decision of Supreme Court in *Morris v. United States*, 174 U.S. 196 (1899)
1910	Decision of Supreme Court in *Maryland v. West Virginia*, 217 U.S. 1 (1910); *Maryland v. West Virginia*, 217 U.S. 577 (1910)
1926	*Middlekauff v. LeCompte*, 149 Md. 621, 132 A. 48 (1926)
1957-58	Maryland attempts to abrogate the Compact of 1785; Virginia files suit in the Supreme Court, *Virginia v. Maryland*, No. 12, Orig.; retired Justice Stanley F. Reed appointed Special Master
1958-62	Maryland and Virginia negotiate and ratify the Potomac River Compact of 1958, creating the bi-state Potomac River Fisheries Commission; Congress approves in 1962

L-689

No. 129, Original

In the
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Before the Special Master
the Hon. Ralph I. Lancaster, Jr.

VIRGINIA'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Garcia, 469 U.S. at 75.

1. The Madison Letters are Legally Inadmissible as Legislative History.

As a starting point, Madison's letters to Jefferson are legally inadmissible because there is no evidence that he shared them with the five commissioners who negotiated the Compact or with any of the legislators who later ratified it. Professor Hoffman speculates that Madison must have "assumed responsibility for explaining the Compact's purposes and intentions to his fellow delegates in the Virginia general assembly. . . ." (Hoffman Aff. at 7). However, Hoffman does not cite any evidence (nor can he) that Madison ever suggested to anyone in the Virginia House of Delegates or the Virginia Senate that Article VII of the Compact was inapplicable above tidewater. As this Court said in *Oklahoma v. New Mexico*, 501 U.S. 221 (1991), even in the context of statements by negotiators:

> It is beyond cavil that statements allegedly made by, or views allegedly held by, "those engaged in negotiating the treaty which were not embodied in any writing **and were not communicated to the government of the negotiator or to its ratifying body,"** are of little use in ascertaining the meaning of compact provisions.

Id. at 236-37 n.6 (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)) (emphasis added).

2. Madison Did Not See the Compact Until After August 9, 1785. Accordingly, His Earlier Letters Do Not Show What He Thought About Particular Articles of the Compact.

Even putting aside their legal inadmissibility, Madison's four letters to Jefferson do not show what Madison thought about the Compact. Madison wrote all of the letters before he had read the text of the Compact.

Letters of March 16, 1784 and April 25, 1784

On March 16, 1784, Madison confided to Jefferson that he was concerned about the language in Virginia's Constitution of 1776, which ceded territory to Maryland while reserving

the free navigation and use of the Potomac River.[39] Madison worried that the Constitution did not adequately protect Virginia's jurisdiction over the Potomac River. Strong historical arguments, based on the earlier charters from King James I and the patents for the Northern Neck, had "armed [Virginia] with a title both of prior & posterior date, to that of Maryland."[40] Madison complained that "[t]he jurisdiction of half of the rivers ought to have been expressly reserved."[41] He suggested three possible solutions, stating his preference for the third:

> What will be the best course to repair the error? – to extend our laws upon the River, making Maryland the plaintiff if she chooses to contest their authority – to state the case to her at once and propose a settlement by negociation – or to propose a mutual appointment of Commissioners for the general purpose of preserving a harmony, and efficacy in the regulations on both sides. The last mode squares best with my present ideas. It can give no irritation to Maryld.; it can weaken no plea of Virga., it will give Maryland an opportunity of stirring the question if she chooses, and will not be fruitless if Maryland should admit our jurisdiction.[42]

Madison suggested that the time was ripe for such a move because Virginia had earned some good will with Maryland by having recently ceded the "back lands" of the Northwest Territory to the United States.[43]

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[39] Letter from Madison to Jefferson of 3/16/1784, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 10.

[40] *Id.*

[41] *Id.*

[42] *Id.*.

[43] *See* Va. Code Ann. § 7.1-3 (Michie 1999) (cession of territory northwest of Ohio River).

Madison wrote this letter nearly a year before the actual conference at Mt. Vernon, and more than two months before Virginia passed its June 28, 1784 resolution calling for the appointment of commissioners.[44] The substance of the compact could not yet be known.

In an Affidavit that reads more like an advocacy piece than an impartial historical analysis, Professor Hoffman infers from this letter that Madison was concerned only with that portion of the Potomac River below the falls.[45] He bases that inference on the sentences that follow Madison's quotation of the Virginia Constitution:

> Is it not to be apprehended that this language will be construed into an entire relinquishment of the Jurisdiction of these rivers [Potomac and Pocomoke], and will not such a construction be fatal to our own port regulations on that side & otherwise highly inconvenient? I was told on my journey along the Potowmac of several flagrant evasions which had been practised with impunity & success, by foreign vessels which had loaded at Alexandria.[46]

One strains to read these sentences to suggest that Madison was indifferent about Virginia's jurisdiction along the River above tidewater. The fact that an assertion of Maryland authority would pose a threat to Virginia's port regulations and its ability to police vessels in the tidewater area does not justify the conclusion that this was all about which Madison cared.

About a month later, on April 25, 1784, Madison wrote Jefferson that:

> On the 16 of March I wrote you fully on sundry points. Among others I suggested to your attention the case of the Potowmac, having in my eye the river below the head of navigation. **It will be well I think to *sound* the *ideas of Maryland* also as to the upper parts of the N. branch of it.** The *policy of Ba[l]timore* will

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[44] Resolution of June 28, 1754, *Journal of the House of Delegates of the Commonwealth of Virginia* (1784) at 84 (White Ed. 1828); 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 89.

[45] Hoffman Aff. at 35-37.

[46] 8 Rutland, *The Papers of James Madison*, supra note 35, at 10.

> probably thwart as far as possible, the *opening of* [it]; & without a very favorable construction of the *right* of Virginia and even the privilege of using the *Maryland bank* it would seem that the *necessary works could not be* accomplished.[47]

The highlighted language confirms that Madison's concerns about Virginia's rights were not limited to the tidewater area. It is difficult to see how this letter constitutes, as Maryland contends, the first of the three occasions on which "Madison stated unequivocally . . . that the Compact was not intended to and did not apply above tidewater."[48]

Letter of January 9, 1785

Madison wrote his letter of January 9, 1785, the day after the close of the Virginia General Assembly session, and sent it to Jefferson in Paris. Madison described the recent passage of the Potomac Company legislation and Washington's efforts to advance it in the Virginia and Maryland Assemblies.[49] Madison went on to discuss Virginia's December 1784 Resolution, authorizing the Virginia commissioners appointed the previous June to join with Maryland's commissioners in inviting Pennsylvania to cooperate in the States' collective effort to open the route west. Madison noted:

> This Resolution did not pass till it was too late to refer it to Genl. Washington's negociations with Maryland. It now makes a part of

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[47] Letter from Madison to Jefferson of 4/25/1784, Rutland, 8 *The Papers of James Madison*, *supra* note 35, at 20 (emphasis in bold added).

[48] Md. Opp. at 34. The sentence about the "opening of [the River]" also rebuts the suggestion that Madison somehow did not care about Jefferson's and Washington's desire to expand trade on the Potomac to the West. *See* Hoffman Aff. at 35 ("Madison showed little interest in Jefferson's proposal.") (citing no evidence).

[49] Letter from Madison to Jefferson of 1/9/1785, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 223-25.

> the task alloted to the Commissrs. who are to settle with Maryd. the jurisdiction & navigation of Potowmac below tide water.[50]

Maryland zeros in on the last phrase of this excerpt "below tide water." Here again, however, the letter does not purport to analyze the text of the Compact itself, which would not even be negotiated or drafted for another three months.

Letter of April 27, 1785

The supposed crown jewel in Maryland's historical argument is Madison's letter of April 27, 1785. Madison wrote:

> **I understand** that Chase & Jennifer on the part of Maryland, Mason & Henderson on the part of Virginia have had a meeting on the proposition of Virga. for settling the navigation & jurisdiction of Potowmac below the falls, & have agreed to report to the two Assemblies, the establishment of a concurrent jurisdiction on that river & Chesapeak. The most amicable spirit **is said** to have governed the negociation.[51]

Both times he quoted from this letter in his Affidavit, Hoffman deleted the phrase "I understand that...," and omitted the last sentence.[52] This letter is crucial, Maryland and Hoffman reason, because it is "post-Compact correspondence [that] makes clear that [Madison] understood that the Compact, **as negotiated**, did not apply above tidewater."[53]

That statement is completely misleading. Maryland and Hoffman both fail to mention that Madison had still not seen the Compact, or discussed its terms with George Mason, when he wrote this letter to Jefferson.

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[50] *Id.* at 225.

[51] Letter from Madison to Jefferson of 4/7/1785 (emphasis added), 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 268.

[52] Hoffman Aff. at 7 n.2, 68 n.133.

[53] Md. Opp. at 35 (emphasis added); *see also id.* at 34; Hoffman Aff. at 7, 68.

Letters Omitted by Maryland and Professor Hoffman

Madison did not learn the results of the Mt. Vernon conference until after August 9, 1785, when George Mason finally wrote to him about it.

On July 17, 1785, Randolph wrote to Madison that he had heard about the conference from General Washington,[54] from whom he had also learned of the happenstance of Mason's and Henderson's attendance.[55] Randolph inquired of Virginia Governor Patrick Henry whether he had delivered Maryland's letter proposing the meeting date to the Virginia commissioners.[56] Governor Henry could not recall but thought he might have sent the papers to Madison.[57] Given that uncertainty, Randolph expressed his concern that the communication to Pennsylvania "has been forgotten: nor can I procure satisfaction on this head."[58]

Madison responded to Randolph on July 26, 1785, explaining that he had previously written to Mason about the conference, but had not yet received any response:

> Your favour of the 17th. inst: . . . came safe to hand. . . .
>
> The urgency of Genl. W. in the late negociation with Maryland makes it probable I think that he will feel some chagrin at the inattention to that with Penna. which has a much nearer connection with his favorite object and was moreover suggested by himself. **Shortly after the date of my last, I dropped a few lines to Col: Mason, reminding him that some report will be expected from the Commissioners by the Assembly, as well as of the real**

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[54] Washington's diaries reflect that he visited Randolph, the "Attorney General," in Richmond on the morning of May 4, 1785. 2 John C. Fitzpatrick, *The Diaries of George Washington* 372 (1925).

[55] Letter from Randolph to Madison of 7/17/1785, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 324.

[56] *Id.*

[57] *Id.*

[58] *Id.*

> **importance of the business. I have not yet recd. any answer;** and begin to suspect that my letter may have miscarried. **Your information leads me to doubt whether he has even been furnished with a copy of the Resolution under which he is to proceed.** I will write him again and inclose one which Mr. Jones sent me.[59]

As indicated by this letter, Madison's first letter to Mason inquiring about the conference was written on June 2, 1785. A copy of that letter has never been found, but Mason referenced the date when he finally responded to it on August 9, 1785.[60]

Mason's letter to Madison of August 9 was clearly the first communication between them about the results of the conference. Mason wrote: "I shou'd have answered your Favour of the 2d of June, long ago, had not ill Health, & the Absence of my Sons from Home, disabled me from making out the Copys of the Proceedings of the Virga. & Maryd. Commrs. **which I now inclose**; and upon which I wish to be favour'd with your Sentiments."[61] Mason went on to

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[59] Letter from Madison to Randolph of 7/26/1785, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 327. Madison's other sources of information were inconclusive. Joseph Jones sent him a letter dated June 12, 1785, reporting "I know not whether any Copy of the resolution you allude to has been officially communicated to Mr. Mason. . . . I heard but have only heard that Mason and Henderson proceeded to execute the other branch of the business committed to Comrs. withot. the attendance or call for attendance of the other Commrs. What they have done has not come to my knowledge." Letter from Jones to Madison of 6/12/1785, *id.* at 292-93.

[60] *See* 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 329 n.4; 2 Robert A. Rutland, Ed., *The Papers of George Mason* 825 (1970) [hereinafter "2 Rutland, *The Papers of George Mason*"].

[61] Letter from Mason to Madison of 8/9/1785 (emphasis added), 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 826; 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 337. It was not until December 8, 1785, that Mason finally sent his official commissioner's report to then Speaker of the Virginia House of Delegates, Benjamin Harrison. Letter from Mason to Harrison of 12/8/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 838-39; *see also id.* at 839 (editor's note).

explain the circumstances of how he had accidentally learned of his appointment and about Washington's invitation for the commissioners to meet at Mt. Vernon.[62]

Given that they have built their "legislative history" on Madison's correspondence, Maryland's and Hoffman's failure to mention these other Madison letters is conspicuous. It is clear, however, that Madison had not yet seen or read the Compact when he wrote to Jefferson on April 27, 1785. Maryland's and Hoffman's failure to recognize this point, or at least to mention it, renders all of their many inferences about what Madison actually "thought" of the Compact after it was negotiated completely untenable.[63]

The only documentary evidence concerning what Madison may have actually thought about the Compact of 1785, once he finally saw it, came in a letter he wrote in January 1787.[64] Pending at that time was a proposal to grant statehood to Kentucky and to give Kentucky and any future neighboring states to the north concurrent jurisdiction over the Ohio River. Madison wrote that any objections to such concurrent jurisdiction for the Ohio "do not appear to me to be well founded."[65] He explained:

> A concurrent jurisdiction is both practicable and equitable. The Delaware as well as the Potowmac furnish examples of it. The law of Nations is explicit on the subject. And taking into view the case of the Mississippi, Kentucky is the last part of the World from

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[62] Letter from Mason to Madison of 8/9/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 826-27; 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 337-38.

[63] *E.g.*, Md. Opp. at 35 (claiming that Madison's 4/25/1785 letter constituted "post-Compact correspondence [that] makes clear that he understood that the Compact, as negotiated, did not apply above tidewater."); Hoffman Aff. at 7 (assuming, without citation to any evidence, that Madison explained the purpose of the compact to his colleagues); 67 (referring to Madison's "own aims for an agreement on commercial matters on the lower river.").

[64] Letter from Madison to Muter of 1/7/1787, 9 Robert A. Rutland, *The Papers of James Madison* 230-31 (1975).

[65] *Id.* at 230.

> which I should have expected to hear of doctrines which impeach the **equal & reciprocal rights of the owners of opposite shores, over the stream itself.**[66]

Madison's belief that Virginia and Maryland exercised concurrent jurisdiction over the Potomac, with "equal and reciprocal rights of the owners of opposite shores," is fully consistent with the view that Articles VI, VII, VIII, X, XI and XII of the Compact applied along the entire Potomac River boundary.[67]

Any suggestion that Madison *not only* thought that those Articles of the Compact were limited to tidewater, but that he also shared such thoughts with the Virginia General Assembly (or the Maryland General Assembly), would require two giant leaps of speculation that this Court would never countenance. Accepting Maryland's version of the "legislative history" would be like divining the intent of Congress when it passed a law by drawing inferences from the text of a private letter, written to a stranger, by a single congressman or Senator, months before the law had been negotiated, debated, drafted or enacted. This Court has rejected proffered statements of legislative history with considerably stronger pedigrees than this. *See, e.g., Garcia*, 469 U.S. at 76 ("We have eschewed reliance on the passing comments of one Member, and casual statements

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[66] *Id.* at 230-31 (emphasis added).

[67] Maryland's reliance on a statement by Rep. Randolph in 1804 also fails to show what the framers thought of Article VII of the Compact twenty years earlier. (Md. Opp. 36-37). Even putting aside the legal insignificance of post-enactment statements by legislators, *e.g., Consumer Prod. Saf. Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980), Maryland takes the quote badly out of context. Randolph did not use the phrase "above the tide water" in reference to Virginia's Compact rights with Maryland, but in reference to the recital contained in Virginia's 1789 Act ceding territory to the District of Columbia. 14 Annals of Cong. 715 (1804) (referencing 1789 Va. Acts c. XXXII, *reprinted in* 13 Hening's Statutes at Large 43 (1823)). Nowhere in those debates did Randolph argue that Virginia lacked compact rights above tidewater. To the contrary, he stated that "[t]he river Potomac was the joint property of the States of Maryland and Virginia under compact between those States." 14 Annals of Cong. 711. He

(continued . . .)

from the floor debates.") (citations omitted); *Consumer Prod. Saf. Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). The fact that the recipient and author of the private correspondence in this case later became our third and fourth Presidents, respectively, does not justify suspending the normal rules of statutory construction relating to the proper use of legislative history.

3. The Virginia Commissioners Believed They Were Settling Jurisdictional Matters Between the States That Were Not Limited to the Tidal Potomac.

Madison's private letters to Jefferson did not and could not influence the Virginia commissioners, Mason and Henderson, because they negotiated the terms of the Compact unacquainted with Madison's earlier correspondence. Recognizing that problem, Maryland offers that Madison's private letters to Jefferson might illuminate what Madison had in mind when he supported the Virginia resolution of June 1784, calling for the appointment of commissioners in the first place. (Md. Opp. at 35).

What Madison may have thought in June 1784 raises no inference about what the commissioners did in March 1785. Yet, there are three more flaws in Maryland's argument.

First, the Virginia Resolution itself did not limit the commissioners' authority to the tidewater portion of the Potomac. The recital stated that "great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland, touching the *jurisdiction and navigation* of the river Potomac."[68] Indeed, there had been many

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"demanded to be shown the conveyance by which Virginia had relinquished her concurrent jurisdiction over the Potomac?" *Id.* at 717.

[68] *Journal of the House of Delegate, supra* note 44, at 84 (emphasis added).

"inconveniences" in both the tidal and non-tidal portions of the River, as the previous efforts by the States to jointly improve navigation above tidewater had demonstrated.[69] The actual authority granted to the Virginia commissioners was to "frame such liberal and equitable regulations concerning the said river, as may be mutually advantageous to the two States; and that they make report thereof, to the General Assembly."[70] On its face, this delegation covered the entire River, with no distinction between tidal and non-tidal portions.

Although one can only speculate about what was actually in Madison's mind in June 1784, the terms of the Virginia Resolution were fully consistent with Madison's statement in his private letter to Jefferson on April 25, 1784, that "[i]t will be well I think to *sound* the *ideas of Maryland* also as to the upper parts of the N. branch of it. The *policy of Ba[l]timore* will probably thwart as far as possible, the *opening of* [it]; & without a very favorable construction of the *right* of Virginia and even the privilege of using the *Maryland bank* it would seem that the *necessary works could not be* accomplished."[71]

Second, Mason and Henderson never saw a copy of that Resolution until *after* the conference had ended, as Mason explained in his letter of August 9, 1785 to Madison.[72]

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[69] *See* Virginia's Opening Brief at 12-15; Hoffman Aff. at 20-25.

[70] *Journal of the House of Delegates*, *supra* note 44, at 84.

[71] Letter from Madison to Jefferson of 4/25/1784, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 20.

[72] Letter from Mason to Madison of 8/9/1785 (stating "neither Mr. Henderson or myself had been furnished with Copys of the Assembly's Resolutions; and I shou'd not have known that I was one of the Persons appointed, had I not, by mere Accident two or three Days before the Meeting, been informed of it, by two of the Maryland Commissioners. . . ."), 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 826, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 337.

Accordingly, the Virginia commissioners were not influenced by the Resolution, regardless of the interpretive gloss that Maryland now seeks to impose on it.

Third, Mason expressly assumed in March 1785 that his authority as a commissioner was similar to that he had been given in December 1777, "to adjust the rights of **the use**, and navigation of, **and jurisdiction over**, the Bay of Chesapeake, and the rivers Potomac and Pocomoke."[73] Mason wrote to Madison that, without a copy of the actual Resolution appointing Henderson and himself:

> [I]t was natural for us to conclude that these last Resolutions had pursued the Style of the former **respecting the Jurisdiction of the two States**; as well as that this Subject had been taken up, upon the same Principles as in the year 1778; when Comrs. were directed to settle **the Jurisdiction** of *Chesapeake Bay & the Rivers Potomack & Pocomoke;* in which Sentiments, Mr. Henderson, from what He was able to recollect of the Resolutions, concurred.[74]

Mason did not even mention the word "navigation" in this context, and he clearly understood that he was negotiating not only matters relating to tidal waters or navigation, but respecting the "*jurisdiction*" of the two States.[75]

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[73] Resolution of December 10, 1777, *Journal of the House of Delegates of the Commonwealth of Virginia* at 74 (1777) (White Ed. 1827) (emphasis added). *See* Virginia's Opening Brief at 9-10.

[74] Letter from Mason to Madison of 8/9/1785 (emphasis added), 2 Rutland, *The Papers of George Mason, supra* note 60, at 827, 8 Rutland, *The Papers of James Madison, supra* note 35, at 337-38.

[75] The Maryland General Assembly was likewise concerned not solely with navigation issues, but with "jurisdiction" over the waters separating Virginia and Maryland. *See e.g., Votes and Proceedings of the Maryland House of Delegates*, November Session, 1784 at 113 (report of Senate concurrence, referencing "purpose of settling the navigation of, and the jurisdiction over," those waters, and giving the commissioners "full power, in behalf of this state, to adjust and settle **the jurisdiction to be exercised by the said states respectively, over the said waters** and the navigation of the same...") (emphasis added). Thomas Stone's letter to Washington of January 28, 1785, likewise showed no distinction between the tidal and non-tidal Potomac; after (continued . . .)

After negotiating the Compact, Mason and Henderson obtained a copy of the June 1784 Resolution. They realized that it empowered "any three of them" to act, not two, and that it referred only to the Potomac River, without mentioning the Chesapeake Bay or the Pocomoke. Mason's concern that he and Henderson had overstepped their bounds was tempered by his conclusion that Maryland would have broken off the negotiations if Virginia did not agree to relinquish the right to impose tolls on vessels passing through the Capes of Chesapeake Bay.[76] While Mason expressed frustration that he would have to travel to Richmond for the next legislative session "to appologize for, & explain our Conduct," he also expressed hope that "Forms will be dispensed with" by the Virginia legislature, "as I am conscious of our having been influenced by no other Motives than the Desire of promoting the public Good."[77]

Ill health prevented Mason from attending the Virginia legislative session, as he explained to Madison by letter dated December 7, 1785.[78] Mason included with that letter a "memorandum" concerning Article VII of the Compact.[79] Although there is no record that the

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expressing his pleasure about the Virginia General Assembly's ratification of the Potomac Company Act "for opening the Navigation of Potowmack," Stone stated that "Mr. Jenifer, Johnson, Chase & myself are appointed Commissioners to Settle the Jurisdiction and Navigation of the Bay & the Rivers Potomack & Pocomoke with the Commissioners of Virginia." 2 W.W. Abbott & Dorothy Twohig, Eds., *The Papers of George Washington* (*Confederation Series*) 297 (1992).

[76] Letter from Mason to Madison of 8/9/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 827, 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 337-38.

[77] 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 338.

[78] Letter from Mason to Madison of 12/7/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 835. *See also* 8 Rutland, *The Papers of James Madison*, *supra* note 35, at 339 n.7 (editor's note).

[79] Memorandum of 12/7/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 837-38.

memorandum was shared with the Virginia legislature,[80] it reveals that Mason believed that there was only one ambiguity in Article VII: "[t]he concluding Clause of the seventh Article of the Compact is not so clearly expressed as it ought to be, & is capable of a Construction, which was not intended; and tho' it wou'd be a strained & unnatural one, it had better be removed."[81] That ambiguity was not in whether the Article applied to the entire River, but in the proviso that "the Citizens of neither State shall have a Right to fish with Nets or Seins upon the shores of the other."[82] Mason worried that:

> This may be construed to restrain the Citizens of either State, having Lands upon the River in the other, from fishing with Nets or Seins upon their own Shores; which wou'd be unreasonable & unjust; altho' in it's present form, it seems to be the Grammatical Construction.[83]

Mason, who himself owned "dual landholdings" on both sides of the Potomac,[84] suggested a possible amendment to avoid that construction, which he expected Maryland to support.[85] But Mason cautioned that no other changes should be made to the text of Article VII, "for this was the most difficult Business we had to settle with the Maryland Commissioners."[86]

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[80] *See* 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 837 (editor's note).

[81] Memorandum of 12/7/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 837.

[82] *Id.*

[83] *Id.*

[84] 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 813 (editorial note).

[85] The amendment would clarify that citizens could not use nets or Seins "upon the shores *of the Citizens* of the other." Memorandum of 12/7/1785, 2 Rutland, *The Papers of George Mason*, *supra* note 60, at 837. Maryland would not oppose that amendment, he wrote, because "[t]he Idea of the Right of fishing on both Shores of Potomack River is one the Marylanders are not fond of parting with. . . ." *Id.* at 838.

[86] *Id.* at 838.

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Perhaps most significantly, Mason said that "I trust it will be found we have obtained **every thing for Virginia, with Respect to Potomack River, which she can desire."**[87] Mason's statement would be echoed by Maryland's commissioners 90 years later, who reported to Maryland Governor Whyte that "Maryland, by the compact of 1785, made at 'Mount Vernon,' the home of Washington, and probably under his supervision, conceded everything that Virginia claimed or requested as to riparian rights on the Southern Shore of the Potomac. . . ."[88]

Maryland fails to mention Mason's letters *anywhere* in its opposition. Although Hoffman cites to the letters and occasionally quotes from them, he conspicuously fails to quote these key passages.[89] That omission is glaring. If one is going to take the time to look at the "legislative history," Mason's comments as a drafter clearly shed more light on the text of the Compact itself than Madison's private letters, written well before Madison had even seen the Compact.

C. Maryland's Arguments About the Potomac Company Are Without Merit.

Looking further for extrinsic evidence, Maryland argues that the Potomac Company charter was inconsistent with the Compact of 1785. Maryland infers from that putative inconsistency that the Compact was not intended to apply above Little Falls.

1. The Compact Was Fully Consistent with the Potomac Company Charter.

Maryland fails to mention the two most important articles of the Compact with reference to the Potomac Company charter: Articles VI and VIII. Article VI provided:

> The river Potowmack shall be considered as **a common highway for the purpose of navigation and commerce** to the citizens of

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[87] *Id.* (emphasis added).

[88] Commission (Maryland) on Boundary Lines, *supra* note 23, at 19.

[89] *See* Hoffman Aff. at 56 & n.107, 57 & n.108, 59 & n.113, 65 & nn.125-26.

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(18)

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

LODGING IN SUPPORT OF THE STATE OF MARYLAND'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,	*	No. 129, Original
Plaintiff,	*	Before Special Master
v.	*	Ralph I. Lancaster, Jr.
STATE OF MARYLAND,	*	
Defendant.	*	

* * * * * * * * * * *

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Maryland seeks the entry of summary judgment in its favor because there is simply no merit in Virginia's claim that Maryland's waterway permitting laws "infringe upon Virginia's sovereignty" and "impede and interfere with Virginia's rights of access to the Potomac River." Complaint ¶ 48. Maryland's present-day regulation of the river is comprehensive in all respects and the result of such longstanding ownership of the Potomac that Virginia has acknowledged it since colonial times. Virginia's claims are contradicted not simply by the history pre-dating Virginia's suit against Maryland, but also by the Commonwealth's continued recognition, even after suit was filed, that its authority over the river ends, and Maryland's begins, at the low-water mark boundary on the Virginia side of the river.

Maryland's authority over the Potomac River traces back almost four-hundred years to the time the Potomac was included in the territory granted by King Charles I to Lord Baltimore. That authority was explicitly recognized in Virginia's first Constitution, it was reaffirmed a century later by the Black-Jenkins Award, and it applies to the activity that Virginia now claims is beyond Maryland's jurisdiction, as that activity takes place in Maryland. Neither the Compact nor the Black-Jenkins Award contains any language that strips Maryland of this fundamental aspect of its ownership of and sovereignty over the River. On the contrary, both States have acted in innumerable ways since their adoption of the Award to reflect their clear understanding that the boundary described there represents the line of sovereignty for all purposes and confirms Maryland's right to regulate waterway construction activity in and water withdrawals from the Potomac River up to the low-water mark on Virginia's side. For these reasons, as discussed more fully below, Maryland's motion for summary judgment should be granted.

STATEMENT OF FACTS

Pre-Compact History

Virginia traces its territorial roots to 1609, when King James I of England issued a charter to the London Company encompassing all of the lands 200 miles north and south of Point Comfort and extending inland, without limitation, "from the sea, west and northwest." *Johnson v. McIntosh*, 21 U.S. 543, 544 (1823). This 1609 grant included within its reach much of the land now comprising Maryland and Pennsylvania, as well as the uninhabited western lands to the Pacific Ocean. It is on this 1609 grant that Virginia in earlier times based its historical claims to the Potomac, Maryland, and the frontier.

The 1609 grant was short-lived. As a result of a dispute between the London Company and the Crown, the grant was annulled in 1624 by judgment of the Court of King's Bench and the powers of government and title to the lands within the limits of the grant were re-vested in the Crown. *Johnson v. McIntosh*, 21 U.S. at 545. As of 1624, Virginia had become a royal colony, whose boundaries were subject to change at the pleasure of the Crown. *Id.*; *Howard v. Ingersoll*, 54 U.S. 381, 400 (1851).

In 1632, King Charles I issued to Lord Baltimore the charter that marks the origin of the Province and State of Maryland.[1] The charter encompassed land previously included within the annulled 1609 grant and specifically included the entire Potomac River from bank to bank. *Morris v. United States*, 174 U.S. 196, 225 (1899). The charter was also significant for the breadth of the powers vested in the newly created colony. *See* Declaration of Jack N. Rakove, Exhibit A, at 8 (Maryland's powers granted in Charter, and as a proprietorial colony,

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[1] Attached as Ex. 69 to Defendant's Brief in Opposition to Plaintiff's Motion For Partial Summary Judgment. All subsequent citations to exhibits that were attached to this earlier brief will have the form "Tidewater Exhibit."

provided it with "more extensive powers of governance within its respective bounds" than other colonies).

Virginia was aware of the breadth of the Maryland Charter and, in fact, argued before the King and the Lords Commissioners for Foreign Plantations that the Charter improperly granted Lord Baltimore powers of sovereignty far more expansive than those given the other colonies, including almost royal power to grant lands, declare war, and manage his colony independent of the other colonies.[2] The Lords Commissioners, after "having heard and maturely considered the sayde propositions, answers and reasons, and whatsoever else was alleged in either parte, did think fit to leave the Lord Baltimore to his Patent and the other partie to the course of Lawe according to their desire."[3]

Subsequent to the issuance of the Maryland Charter and the rejection of Virginia's challenge thereto, King Charles II issued patents in 1649 and 1688 for what is commonly known as the "Northern Neck" of Virginia – the land lying between, and including, the Potomac and Rappahanock rivers.[4] The 1688 grant was of no effect to the extent it purported to alter the boundary in Maryland's prior Charter because the Charter was "never devested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper" who never made "any substantial claim . . . to property rights in the Potomac river, or in the soil thereunder. . . ." *Morris v. United States*, 174 U.S.

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[2] Browne, ed., *Proceedings of the Council of Maryland, 1636-67* at 17-19 (Considerations upon the Patent to Lord Baltimore, 1632) (Exhibit CC-18).

[3] *Id.* at 22 (Order of the Lords Commrs. For Foreign Plantation, July 3, 1633).

[4] *Morris v. United States*, 174 U.S. at 223-24; *Maryland v. West Virginia*, 217 U.S. 1, 28 (1910).

at 225. *See also Marine Ry. & Coal Co., Inc.*, 257 U.S. 47, 63 (1921) ("The latter grant is subordinate to the former.").

Although the 1609, 1649, and 1688 grants did not alter the scope of Maryland's Charter, Virginia in 1776 formally renounced any rights or claims it may have harbored with respect to Maryland territory:

> [T]he territories within the charters erecting the colonies Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which may at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been made or shall be made thereon.[5]

The effect of Virginia's concession was not lost on James Madison, who, writing just eight years after the enactment of the Virginia Constitution, recognized that this provision constituted "an entire relinquishment of the Jurisdiction of these [the Potomac and Pocomoke] rivers."[6]

Maryland reacted swiftly and passed a resolution at a convention of its delegates in October of that year denying that Virginia had any territorial rights over the Potomac or any other portion of Maryland territory to begin with:

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[5] 1776 Va. Const. Art. 21, *reprinted in* Julian P. Boyd, ed., *Papers of Thomas Jefferson*, vol. 1, at 347-365 (Princeton, 1950) (Tidewater Exhibit 19).

[6] Madison to Jefferson (Mar. 16, 1784), *reprinted in* Robert A. Rutland, *The Papers of James Madison*, Vol. 8, at 10 (Tidewater Exhibit 34). *See also* Affidavit of Ronald Hoffman, Ph.D., Tidewater Exhibit A, at 36.

> Resolved unanimously, That it is the opinion of this convention, that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore.[7]

Maryland explicitly rejected Virginia's effort to reserve even limited rights in the Potomac:

> Resolved unanimously, That it is the opinion of this convention, That the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter, belongs to this state; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this state; and that the river Potowmack and that part of Chesapeake bay which lies between the capes and the south boundary of this state, and so much thereof as is necessary to the navigation of the rivers Potowmack and Pocomoke, ought to be considered as a common highway, free for the people of both states, without being subject to any duty, burthens or charge, as hath been heretofore accustomed.[8]

Maryland's assertion of its Charter rights, like Virginia's disclaimer of any such rights, could not have been clearer.

The Compact of 1785

Thus, when the two States came to the negotiations that would result in the Compact of 1785, Maryland held a decided advantage with respect to the Potomac. Virginia had already conceded to Maryland "all the rights of property, jurisdiction, and government" in the Potomac, reserving only "the free navigation and use" of the river and property rights to the shore and shoreline improvements. As recognized by its congressional delegation less than twenty years later, Virginia claimed no rights of jurisdiction or governance whatsoever. *See, e.g., Annals of Cong.,* 8th Cong., 2nd Sess. at 715 (Tidewater Exhibit 84) (Virginia

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[7] Lucas & Deaver, eds., *Proceedings of the Conventions of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Exhibit 20).

[8] *Id*; *see also* Hoffman Aff., Tidewater Exhibit A, 25-28.

representative John Randolph, stating that "[Virginia's] limits did not extend beyond high water mark on the western bank of the Potomac. Her right of highway on the river was a natural right acknowledged and secured by convention with Maryland. Her civil jurisdiction over its water was a conventional right, entirely derived from compact with that State, was a jurisdiction not within her limits"), 717 (Randolph stating that Virginia's "concurrent jurisdiction over the Potomac" was "confessedly without her limits").

While the Compact was drafted to address generally issues of navigation and jurisdiction with respect to the Potomac and Pocomoke Rivers and the Chesapeake Bay, Virginia succeeded in Article VII of the Compact in obtaining Maryland's agreement that the citizens of Virginia who own land on the Potomac would have the "privilege" to build wharves and other improvements so long as those improvements do not impede navigation, and the common right of fishery. It was this last point that was most hotly contested, with George Mason noting for Virginia that "[t]he Idea of the Right of fishing on both Shores of Potomack River is one the Marylanders are not fond of parting with . . . ." Robert A. Rutland, *The Papers of George Mason*, vol. 2 at 838 (Tidewater Exhibit 67). Having successfully negotiated a common right of fishery, Mason noted "I trust it will be found we have obtained every thing for Virginia, with Respect to Potomack River, which she can desire." *Id.*

While Article VII addressed Potomac River access and use, Article VIII reaches specific but limited jurisdictional issues, agreeing that "all laws and regulations" for the preservation of fish, the performance of quarantine, or preserving and keeping open the channel and navigation of the Potomac "shall be made with the mutual consent and approbation of both states." Tidewater Exhibit 63; *Wharton v. Wise*, 153 U.S. 155, 163-66

(1894). No such provision is made in Article VII regarding the "laws and regulations" governing other uses of the River, including the privilege of wharfage recognized therein.

Maryland's Post-Compact Regulation of the Potomac through the Black-Jenkins Award Era

Maryland's regulation of the Potomac in the late 18th and 19th centuries is reflected in the actions of its legislature, courts, and its Commissioner of Land Records. The modern administrative State, and its attendant files and records, were still some years off, and so the regulatory record is reflected in periodic events that shed light on how Maryland exercised its sovereign role in the Potomac.

The first such event arises in the context of the creation of the District of Columbia. Maryland and Virginia each enacted laws ceding an area ten miles square for the formation the new Nation's capital. On December 23, 1788, Maryland passed "An act to cede to congress a district of ten miles square in this state for the seat of the government of the United States." *Morris v. United States*, 174 U.S. at 198 (citing Kilty's Laws Md. p. 46, Ch. 2). On December 3, 1789, Virginia passed its analog, purporting to cede property "on the banks of the river Patowmack, above tidewater." 1789 Va. Laws Ch. 32 (preamble). Subsequently, on September 8, 1791, Thomas Jefferson and James Madison attended a meeting of the District of Columbia commissioners in which the commissioners wrote the Maryland legislature:

> That it will conduct much to convenience and use, as well as beauty and order, that wharfing should be under proper regulations from the beginning. . . . Your memorialists therefore presume to submit to your honors whether it will not be proper to . . . enable the commissioners or some other corporation, till congress assumes the government, to license the building of wharves, of the materials, in the manner, and of the extent they may judge disirable and convenient, and agreeing with general order.

Morris v. United States, 174 U.S. at 306 (White, J., dissenting) (quoting letter). On

December 19, 1791, Maryland responded and passed amendatory legislation that ratified the earlier cession and gave the commissioners the powers they sought:

> That the commissioners aforesaid, for the time being, or any two of them, shall, from time to time, until congress shall exercise the jurisdiction and government within said territory, have power to license the building of wharves in the waters of the Patowmack and the Eastern Branch, adjoining the said city, of the materials, in the manner and extent, they may judge durable, convenient and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance.

1791 Md. Laws Ch. 45, § 12. On July 20, 1795, the Board of Commissioners of the District of Columbia acted under Maryland's grant of authority to publish wharfing regulations, stating that such regulations were enacted "in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington." *Morris v. United States*, 174 U.S. at 283. After promulgation of the regulations, the Board in fact proceeded to issue licenses to individual wharves. *Id.*

With the bulk of commerce on the river originating in Georgetown, little record exists of Maryland's regulation of wharves and other improvements outside of the District of Columbia until 1862, when Maryland granted to each of its citizens owning land on the navigable waters of the State "the exclusive right of making improvements into the waters in front of his said land" provided that such improvements not "interfere with the navigation of the stream of water into which the said improvement is made," 1862 Md. Laws Ch. 129, § 46, and subject to the continuing regulation and control of the State legislature. *See, e.g.*, *Harbor Island Marina, Inc. v. Board of County Comm'rs of Calvert County, Md.*, 286 Md. 303, 318-319, 407 A.2d 738, 747 (1979) ("This Court has previously recognized that riparian rights are "subject . . . to (the) general rules and regulations (properly) imposed by the public

authorities (as) necessary to protect the rights of the public."). Maryland did not establish a formal licensing program for wharves, piers, and other improvements in the tidal portion of the Potomac until 1970.

Maryland's regulation of water withdrawals from the Potomac in the 19th century followed a similar pattern. Prior to Maryland's establishment in 1933 of a formalized permitting system, water rights disputes were resolved by the courts and the legislature. With respect to the Potomac, such disputes were decided by the Maryland courts. In the 1820s, Amos Binney went to the Maryland Chancery Court to secure, unsuccessfully, water rights for the operation of his mill on the Maryland shore against the increasing withdrawals of the Chesapeake & Ohio Canal Co. ("C&O Canal"). *Binney's Case*, 2 Bland 99 (Md. 1829). In the 1850s, the Great Falls Manufacturing Company of Virginia went to the Circuit Court for Montgomery County, Maryland, to press its claim for water rights on the Virginia shore of the Potomac against the Washington Aqueduct's withdrawals. *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland, *reprinted as* Sen. Doc. 42, 35th Cong., 2d Sess. (1859), Tidewater Exhibit 85.

The circumstances surrounding the *Great Falls Manufacturing* case show how other Maryland institutions, particularly the legislature and the Commissioner of Land Records, were regulating water rights in the Potomac. When the United States sought to withdraw water from the Potomac to supply the District of Columbia, it came to the Maryland legislature for approval. In 1853, the Maryland General Assembly passed "An Act giving the assent of the State of Maryland, to such plan as may be adopted by the President of the

United States, for supplying the City of Washington with Water." 1853 Md. Laws Ch. 179.[9] The Maryland Land Office also regulated water rights through the patent process. For example, when the Great Falls Manufacturing Company sought to secure water rights to the Potomac in the wake of the Montgomery County Circuit Court decision denying the same, it came to the Maryland Land Office to take out a patent to *Neilson's Desire*, which included the water within the Potomac between Conn's Island and the Virginia shore. *See United States v. Great Falls Manufacturing Co.*, 21 Md. 119 (Md. 1864).

Maryland's power to tax structures on the Potomac is likewise revealed during periodic episodes of litigation over the river. In the late 1850s, the Virginia and Maryland Bridge Co. at Shepherdstown, a Virginia corporation, contested the right of Maryland to tax a bridge across the Potomac at Shepherdstown, in what was then Virginia and is now West Virginia. With the Virginia Attorney General arguing on behalf of the Company, the Maryland Court of Appeals upheld the validity of the tax. *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1 (1861).

Maryland regulated bridges in other ways besides taxing them. In 1876, Maryland enacted a law requiring the approval of the Maryland Board of Public Works for all railway bridge crossings of Maryland's navigable waters. 1876 Md. Laws Ch. 242, § 21. This was a formal permitting regime, requiring the review and approval of specific plans and proposals. In 1907, the law was applied to a Virginia corporation, the Norfolk & Western Railway, which sought to construct a railway bridge across the Potomac and the C&O Canal

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[9] The Virginia law passed in connection with the construction of the Aqueduct does not address water withdrawals and is limited to providing consent for the United States' acquisition of "land necessary for an abutment and quarries for the construction of a dam across the Potomac." 1854 Va. Laws Ch. 5.

near Shepherdstown, West Virginia. As the General Manager of the C&O Canal twice noted in letters to the company, "It will be necessary to procure the approval of the Board of Public Works before you can cross the Potomac River." May 11, 1907 letter to Charles S. Churchill, Chief Engineer, Norfolk & Western Ry. Co. from G.L. Nicholson, General Manager, C&O Canal Co. (Exhibit Z-1 at MD-BPW-00039-40); *see also* May 17, 1907 letter to Charles S. Churchill, Chief Engineer, Norfolk & Western Ry. Co. from G.L. Nicholson, General Manager, C&O Canal Co. (Exhibit Z-2 at MD-BPW-00040) (noting that "[y]ou will, however, have to obtain the approval of the Board of Public Works for the crossing of the Potomac River, as well as the canal").

Post-Black-Jenkins Award History

Although Virginia by its 1776 Constitution relinquished any claim to the Potomac River beyond its "shores or strands," the precise location of the boundary line on the south side of the River had not been decided, with Maryland claiming under its Charter to the high water mark. The two States also disagreed about the location of the line, called for in the Maryland Charter, that extended across the Chesapeake Bay and Eastern Shore to the Atlantic. To avoid litigation over the issues, Maryland and Virginia appointed commissioners in 1872 and 1873 to negotiate a settlement of the outstanding disputes. When that effort failed, the two States turned to binding arbitration. The arbitrators issued their award on January 16, 1877, and determined the boundary to be the low water mark on the south shore of the Potomac. (App. 45a.)[10]

The arbitrators noted that while Virginia had made a "claim for a boundary on the left

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[10] References to "App." are to the appendix filed with Virginia's motion for leave to file its Bill of Complaint.

[or north] bank of the Potomac" (App. 17a), "[t]he intent of the charter is manifest all through to include the whole river within Lord Baltimore's grant." (App. 19a.) The arbitrators thus stated that "the charter was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth . . . ." *Id.* The arbitrators concluded, however, that Virginia had acquired title to the strip of land lying between high water mark and low water mark through a long history of prescription. (App. 28a-29a.) Accordingly, the arbitrators' Award stated, among other things, that Virginia was entitled "not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership . . . ." (App. 48a-49a.) This right could not be exercised with the effect of "impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five." (App. 49a.)

Since their adoption of the Black-Jenkins Award, Maryland and Virginia have embarked and continued on a course of conduct for more than a century manifesting the belief and understanding of both States that the low-water mark boundary line represented a uniform line of sovereignty with respect to all activity occurring on Maryland's side of the line. In 1888, Maryland began the active regulation of sand and gravel mining from Maryland waters, including the Potomac. Under the common law, riparian owners had no right to mine sand and gravel from the navigable waters in front of their land. *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d 534, 537 (4th Cir. 1958). With the advent of the mechanical dredge in the 19th century, it became possible to dredge sand and gravel from the river bed itself without the permission or knowledge of the riparian owners on the

shoreline. *Id.* In response to unauthorized dredging, Maryland in 1888 adopted a criminal statute which forbade "any person to dig, dredge, take and carry away any sand, gravel or other material from the bed of the Potomac River . . . ." 1888 Md. Laws Ch. 362 (Ex. CC-2). In 1900, Maryland created an exception to the 1888 law's blanket prohibition, making it

> lawful for any riparian owner of lands bordering on said Potomac River, or for any person or corporation with whom such owner shall have a contract in writing for the purpose, or for the agents, servants or employees of such person or corporation to dig, dredge, take and carry away sand, gravel or other material from the bed of said river opposite said lands from high water mark on the shore bordering on said lands to the outer line of the channel nearest said shore, subject to the laws of the United States relating to navigation. And provided, further, that none of the provisions of this section shall be deemed to interfere in any manner with the provisions of any law of the State of Maryland relating to the taking and catching of fish and oysters.

1900 Md. Laws Ch. 577; *see also* 1906 Md. Laws Ch. 426 (extending sand and gravel rights to riparian owners throughout Maryland). In 1958, the United States Court of Appeals for the Fourth Circuit held that the phrase "any riparian owner of lands bordering on said Potomac River" in the Maryland law was "equally descriptive of the owners of lands in Virginia as of those of lands in Maryland" and that the riparian rights of Virginia landowners were governed by the Maryland law. *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d at 539.

The 20th century bore witness to a number of other actions substantiating the understanding of both States that the boundary line set forth in the Black-Jenkins Award represented the point at which Virginia's sovereignty ended and Maryland's began. In 1906, for example, an assistant to the Virginia Attorney General observed that the Potomac River beyond the low water mark is not Virginia territory, that Virginia had no authority to license or otherwise regulate the sale of liquor upon a vessel anchored below low water mark, and that the liquor laws of Maryland controlled because Maryland has jurisdiction over such

activity. *See* July 2, 1906 Va. Att'y Gen. 87 (Exhibit CC-8). In 1935, the Virginia Attorney General recognized the territorial limitation on Virginia's sovereignty in another context, stating to the Virginia Commissioner of Fisheries that Virginia's oyster tax did not apply to oysters taken from the Potomac River because the tax was limited to oysters taken from the river beds of Virginia, and the bed of the Potomac is not owned or leased by the Commonwealth. *See* June 21, 1935 Va. Att'y Gen. Op. 147 (Exhibit CC-9). Virginia's Attorney General later informed the Virginia Governor in the 1940s that the Commonwealth had only limited jurisdiction under the Compact over certain crimes that occur in the Potomac, that Virginia had no statute that gave it general criminal jurisdiction over the river, and that Virginia was thus unable to regulate slot machines operated on the Maryland side of the low-water mark. *See* September 1, 1944 Va. Att'y Gen. Op. 91 (Exhibit CC-10).

Virginia has expanded upon this recognition of its limited jurisdiction by stipulating in this case that, since at least 1900, its statutory laws have not provided for, and it has not exercised, general criminal jurisdiction over crimes occurring on the Maryland side of the boundary line, even crimes that occur on structures that extend from Virginia's side of the river. *See* Exhibit CC-14, ¶¶ 7, 8. Over sixty years before it made this concession, however, Virginia's Attorney General stated that Virginia could do nothing about an individual who had a Maryland license to sell beer on Sundays on a pier attached to the Virginia side of the Potomac, asserting that, even though this activity was unlawful in Virginia, the territorial jurisdiction of the Commonwealth ends at the low-water mark and does not extend to any portion of a pier built beyond the boundary line into Maryland. *See* July 13, 1948 Va. Att'y Gen. Op. 118 (Exhibit CC-11).

In 1952, the Virginia Attorney General again recognized the boundary line and the

jurisdictional line of sovereignty in expressing the view that the Commonwealth lacks the authority to license waterfowl blinds beyond its boundary in the Potomac. *See* July 30, 1952 Va. Att'y Gen. Op. 116 (Exhibit CC-12). Fifteen years following that recognition, the Virginia Attorney General concluded that filling in and construction beneath a pier also would not change the Commonwealth's lack of authority over that portion of the pier in Maryland, stating that while the rights of a riparian owner include the right to build a pier or wharf that is subject to regulation, the lawful exercise of such a right does not alter the boundary line between Maryland and Virginia. *See* April 25, 1967 Va. Att'y Gen. Op. 48 (Exhibit CC-13). Similarly, much like the stipulation concerning general criminal jurisdiction, Virginia has stipulated that since at least the turn of the last century it has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to activities or structures in the river, *see* Exhibit CC-14, ¶ 10, and it has admitted in its responses to Maryland's interrogatories that, with respect to the same activities and structures, Virginia does not enforce, to this day, any laws relating either to these subjects or to alcohol, public safety, hunting or fishing. *See* Exhibit CC-15, Interrogatory Response No. 13.

Conversely, during this same time frame, Maryland has exercised the precise regulatory authority that Virginia has recognized it could not. Since 1908, Maryland law has provided that the jurisdiction of every county bounded by navigable waters extends from the shore to the inside of the channel, "except where said waters adjoin neighboring States, in which case the jurisdiction of said counties shall continue to the ultimate limits of the State at the place in question." 1908 Md. Laws Ch. 487 (Exhibit CC-3). Pursuant to this law, Maryland and its political subdivisions have asserted and extended their police power

authority to the low-water mark on the Virginia side of the river, and to piers, wharves and other structures that extend beyond the boundary line into Maryland, in virtually every conceivable way in which that authority could be exercised.

Maryland has, for example, routinely applied and enforced its criminal laws with respect to a broad range of activities occurring on Maryland's side of the low-water mark, including those that have taken place on piers and wharves attached to the Virginia side of the river. *See* Declaration of Fred Davis, Exhibit B; Declaration of Francis "Buddy" Garner, Exhibit C; Declaration of Richard Voorhaar, Exhibit C; Declaration of Dennis I. Leland, Exhibit D. Indeed, while some of those activities, specifically, slot machine gambling, were initially lawful in Maryland, they were illegal in Virginia and so Maryland prohibited such activities to accommodate Virginia's request that Maryland take action where Virginia could not. *See Miedzinski v. Landman*, 218 Md. 3, 145 A.2d 220 (1958). Maryland has also routinely issued a variety of licenses with respect to structures extending from the Virginia side of the Potomac into Maryland and activities occurring on those structures. *See* Declaration of Edward C. Papenfuse, Exhibit W; Declaration of Lisa Bailey, Exhibit K; Declaration of Patricia Insley, Exhibit L; Declaration of Janice C. DeAtley, Exhibit T; Declaration of Faye Gatton, Exhibit U; Declaration of Elinor A. Mattingly, Exhibit V; Declaration of Kenneth A. Schertle, Exhibit O; Declaration of Michael Williams, Exhibit M; Declaration of Rick Forrester, Exhibit N. Maryland has taxed those structures and activities, *see* Declaration of Robert C. Farr , Exhibit F; Declaration of James W. Spence, Exhibit H; Declaration of James Loftus, Exhibit J; Declaration of Edward Muth, Exhibit I; Declaration of Joseph W. Norris, Exhibit G; Declaration of Edward C. Papenfuse, Exhibit W; it has performed health and safety inspections, not only for activities on the piers and wharves, but

also for the structures themselves, *see* Declaration of Patricia Herriman, Exhibit P; Declaration of Ann Rose, Exhibit Q; Declaration of Walter Miles, Exhibit R; Declaration of Walter Raum, Exhibit S; and it has exercised its regulatory authority at the specific request of Virginia officials to accomplish what those officials recognized they were unable to achieve due to the jurisdictional limitations imposed on them by the low-water mark boundary line. *See* Herriman Decl., Exhibit P, ¶¶ 24-29, 33; Davis Decl., Exhibit B, ¶¶ 3-4.

The two States have accorded identical treatment to the boundary line set forth in the Black-Jenkins Award in the area of water withdrawals from and construction in the Potomac River, as they have in the other areas discussed above. Both Virginia and Maryland have recognized the boundary as the point at which Virginia's authority over the river terminates and Maryland's begins. Virginia has stipulated, for example, that "[n]either the Virginia Marine Resources Commission, nor any of its predecessor agencies has issued a permit, certification, or other authorization governing construction in the Potomac River on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 6. Similarly, the Commonwealth "has never set or enforced water quality standards with respect to the Potomac River on the Maryland side of the Maryland-Virginia line." *Id.*, ¶ 4. Likewise, Virginia has admitted that "no agency of the State government of Virginia currently requires a permit from any Virginia user to withdraw water from the Potomac River," Exhibit CC-15, Interrogatory Response No. 4; that "it has not issued or been requested to issue any licenses or permits for the withdrawal of water from the Potomac River," *id.*, Interrogatory Response No. 5, and that "it has not, to date, issued or denied any water appropriation permits with respect to the withdrawal of water from the Potomac River." Exhibit CC-16, Response to Request for Admission No. 29.

Maryland, in contrast, has long regulated the Potomac in these areas. The modern Maryland regulatory system for controlling waterway construction and water withdrawals was established in 1933. 1933 Md. Laws Ch. 526 (currently codified at MD. CODE ANN., ENVIR. ART. § 5-501 *et seq.*) ("Water Resources Law") (Exhibit CC-4). The Water Resources law established permitting systems for both water withdrawals and waterway construction in the waters of the State. Maryland issued the first water appropriation permits under the law in the 1930s. *See, e.g.*, Declaration of Matthew G. Pajerowski, Exhibit X, ¶¶ 4-5. The first application to withdraw water from the Potomac came in 1955, when the Potomac Electric Power Company (PEPCO) sought to withdraw water in connection with a power plant initially planned for the Virginia side of the Potomac in Loudoun County and then later relocated to Maryland. *Id.*, ¶¶ 6-7.

Fairfax County, Virginia was the first Virginia entity to follow through on an application for a Maryland permit. Fairfax County submitted its application in 1956 and was issued a permit on February 25, 1957, authorizing the withdrawal of up to 15 million gallons per day from the Potomac. *Id.*, ¶¶ 8-9. Four months after the Fairfax County Water Authority was created in 1957, Fairfax County requested that the Maryland permit be transferred to the Authority, which Maryland did on January 24, 1958. *Id.*, ¶ 10. Although the Authority's permit eventually lapsed for failure to initiate withdrawals, *id.*, ¶¶ 11-15, Virginia applicants continued to come to Maryland for permits during the 1960s. *Id.*, ¶¶ 16 (Great Eastern Utilities Corp.), 18 (Town of Leesburg). During this time, Virginia and its political subdivisions participated in the Maryland permit process by submitting comments on the proposed applications and, in the instance of the Town of Leesburg, asking that Maryland not grant the requested permit. *Id.*, ¶¶ 47-49.

The Fairfax County Water Authority in 1973 was the next, and most controversial, Virginia application for a Maryland withdrawal permit. The Authority's application came at a time of great concern about the ability of the Potomac to meet the water supply needs of the Washington Metropolitan Area. The Washington Suburban Sanitation Commission ("WSSC"), which serves many of the Maryland suburbs of Washington, had recently applied for a permit from the U.S. Army Corps of Engineers ("the Corps") to construct a weir across the Potomac to facilitate its withdrawal of water during periods of low flow. The Corps declined to authorize the structure unless and until an agreement could be worked out allocating the water in the river during periods of low flow. *See* Ex. CC-22 at VA-SRC-002656.

The Authority's application prompted a response from both sides of the river, with most commenters – including the Towns of Leesburg and Herndon, Virginia – expressing concern about how the Authority's withdrawal would impact their ability to use the river. Exhibit X, ¶¶ 55-57. The Commonwealth of Virginia itself supported the Authority's application and, while acknowledging that Potomac flows were not sufficient to meet all demands, expressed hope that "under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed." *Id.*, ¶ 58. While Maryland had already included conditions in its permits requiring permittees to reduce their use during such periods, *see, e.g.*, Exhibit X-17 (Town of Leesburg permit), the Washington Aqueduct, which was the largest user on the river, claimed exemption from Maryland's permit system. Exhibit CC-20 at VA-SRC-002724-25.

While the Authority's application was pending, the process of negotiating a low flow

allocation agreement that would require all users to reduce their withdrawals during periods of low flow began in earnest. Although Maryland and Virginia stood together through most aspects of the negotiations, the Commonwealth eventually noted "for the record" that it had not "recognized" Maryland's permitting authority over Virginia withdrawals from the Potomac. Ex. CC-21. Maryland, for its part, maintained that all withdrawals from the mainstem Potomac River in Maryland were subject to its regulatory authority, as exercised since 1933 and earlier. Exhibits CC-20 and 26.

The version of the Low Flow Allocation Agreement ("LFAA") eventually signed by Virginia, Maryland, the Corps, the WSSC, and the Fairfax County Water Authority specifically recognizes Maryland's permitting program and uses it as a means of enforcing the agreement with respect to non-signatories, which include a number of Virginia permittees. *See* Pajerowski Decl., Exhibit X, ¶ 75. All parties agreed in Article 3.C that nothing in the LFAA was meant to undermine Maryland's permitting system (App. 94a), and Virginia applicants continued to come to Maryland for both new and renewed permits, applying for them without objection or protest. In fact, since 1976, twenty-two permits have been issued to Virginia entities, Exhibit X, ¶¶ 23-45, including permits to seven new users.[11]

Maryland's regulation of waterway construction in the Potomac since enactment of the 1933 Water Resources Law follows much the same pattern as its regulation of water appropriations. In 1964, the Fairfax County Board of Supervisors applied to construct a

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[11] The Town of Lovettsville (1988, 1990, 2001), Exhibit X, ¶ 28, 31, 44; P.D. Gravett (1988), *id.*, ¶ 30; Williams/Transco Gas Pipeline (1988, 2000), *id.*, ¶¶ 29, 42; Xerox Realty (1991), *id.*, ¶ 34, Bondy Way Development Corp. (1992), *id.*, ¶ 35; River Creek Limited Partnership (1994), *id*, ¶ 36; and Lansdowne Conservancy/University Development (1996), *id*, ¶¶ 39, 43.

sanitary sewer across the Potomac in order to connect with the Potomac Interceptor sewer line near the town of Carderock, Montgomery County, Maryland. Exhibit W-35, MD-OAG-00342. In 1968, the Town of Leesburg sought a permit to construct a drinking water intake to effectuate its withdrawal of water under its Maryland water appropriation permit. Declaration of Amanda Sigillito, Exhibit Y, ¶ 3. Other Virginia political subdivisions – *e.g.*, the Fairfax County Water Authority, Northern Virginia Regional Park Authority – sought Maryland permits for water intakes and other, smaller structures. *Id.*, ¶¶ 4-20.

Maryland has issued several waterway construction permits to Virginia entities and political subdivisions since 1933 and, until the Fairfax County Water Authority's 1996 application for a mid-river that gave rise to this case, no Virginia entity, public or private, had ever questioned Maryland's authority to regulate the placement of structures in, on, or over the bed of the Potomac River in Maryland territory. *See id.*, ¶ 22. In fact, the Commonwealth has actively referred Virginia applicants to Maryland for review of non-tidal shoreline projects. *See, e.g.*, Sigillito Declaration, Exhibit Y, ¶ 26; Exhibit CC-27, VA-MRC-F-00756; Exhibits CC-32 and 33.

In 1970 Maryland enacted the Tidal Wetlands Act to regulate more closely the construction occurring on the tidewater stretch of the Potomac River. This law established a formal licensing system for obtaining the approval of the Maryland Board of Public Works for the dredging or filling of, and the placement of structures in, Maryland's tidal waters and wetlands, defined to include all the lands beneath the high water mark within the State. 1970 Md. Laws Ch. 241. On the Virginia side of the Potomac, this means Maryland regulates all structures extending beyond low water mark as established in the Black-Jenkins Award and

mapped by the Mathews-Nelson Survey.[12]

The first Maryland licenses for projects on the Virginia shoreline of the Potomac River were issued in 1971. While most of these early licenses were for dredging projects, Maryland soon licensed a number of jetties, groins, bulkheads, piers, and other similar structures. From the earliest period, Virginia referred these applicants to Maryland.[13] The Virginia Marine Resources Commission ("VMRC") – the Virginia agency charged with regulating the construction of riparian improvements on submerged lands – routinely notified Potomac applicants that it did not have jurisdiction over their projects and copied Maryland on the letter. *See, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 21-23. For example, on August 19, 1985, the VMRC informed John A. Taylor, Virginia Power, that

> if your proposed project extends channelward of the mean low water you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland. I recommend that you contact the Maryland Department of Natural Resources, Wetlands Permit Section, Water Resources Administration, Tawes State Office Building, Annapolis, Maryland 21401, for more information on their permitting requirements.

Exhibit BB-29, VA-MRC-00075.

In 1987, the Maryland Board of Public Works established a policy to clarify for

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[12] Prior to 1970, the Maryland Board of Public Works reviewed projects involving Maryland tidal waters and wetlands that were forwarded to it by the U.S. Army Corps of Engineers. *See, e.g.*, McDonald Decl., Exhibit Z, ¶¶ 6-9. Among those projects referred to the Board were some involving the Virginia shoreline of the Potomac. *See, e.g.*, *id.*, ¶ 9, Ex. Z-7 (minutes of Maryland Board of Public Works authorizing bulkhead and dredging project at Fairview Beach, King George County, Virginia).

[13] Virginia advised its citizens to contact Maryland for permits even before the establishment of Maryland's current licensing regime. *See, e.g.*, Exhibit CC-19 (April 20, 1967 letter from George H. Badger, Jr., Commonwealth of Virginia, Commission of Fisheries, to Mrs. E.C. Rector, advising that "since this pier will be built in part of Charles County, Maryland, no license or permit is necessary from this agency. I suggest you contact U.S. Army Engineers in Baltimore and the Maryland Department of Chesapeake Bay Affairs in Annapolis, Maryland").

Virginia riparian owners along the Potomac the types of activities that would require a formal license from Maryland. In 1994, that policy was formalized by regulation. *See* Code of Maryland Regulations ("COMAR") 23.02.04.21. Under the policy, the Commonwealth continues to refer Virginia applicants to Maryland through letters informing them of Maryland's jurisdiction.

Since the advent of the 1987 policy, most of these authorizations have come in the form of a letter from Maryland informing the applicant that the project, while under Maryland's jurisdiction, does not require the issuance of a formal wetlands license, with its attendant public hearing and notice and comment process. While the vast majority of Virginia applications are granted, on occasion authorization is denied, usually early in the process before significant resources are expended. For example, officials from the Maryland Department of Natural Resources informed representatives of the Town of Quantico, Virginia, that Maryland would not authorize a marina dredging project in the Potomac due to the presence of ecologically valuable submerged aquatic vegetation. *See* Exhibit CC-29.

According to existing records, Maryland has issued between 250 and 350 authorizations to Virginia citizens for the placement of piers, bulkheads, and other structures extending beyond the low water mark on the Virginia shore of the Potomac River. *See* Ayella Decl., Exhibit BB, ¶¶ 15-18. Maryland has located roughly the same number of letters from the Commonwealth to its citizens along the Potomac acknowledging that Maryland has jurisdiction over the construction of improvements beyond low water mark in the Potomac River. *See, e.g.*, Exhibit BB-346 (collecting VMRC referral letters not included in other exhibits). The Commonwealth continues to acknowledge Maryland's jurisdiction over the construction of riparian improvements on the Virginia shoreline of the Potomac,

even after the Supreme Court granted Virginia's Motion to File a Bill of Complaint in May, 2000. *See* Ayella Decl., Exhibit BB, ¶¶ 24-30, Exhibit BB-269 (August 1, 2001, VMRC letter advising Virginia applicant that area channelward of mean low water is subject to Maryland jurisdiction).

ARGUMENT

I. MARYLAND HAS REGULATORY AUTHORITY OVER ACCESS TO THE POTOMAC.

Maryland is entitled to the entry of summary judgment in its favor for the principal reason that the relief Virginia seeks is based on an incorrect interpretation of the Compact of 1785 and the Black-Jenkins Award of 1877. While Article VII of the Compact provides that "[t]he citizens of each state respectively shall have full property in the shores of [the] Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging," the Compact, as Virginia acknowledges, "did not determine the boundary between the States." Complaint ¶ 9. Rather than relinquish any of the rights of government, sovereignty, and jurisdiction that accompany a boundary determination, Article VII merely recognizes that Virginia citizens may exercise "the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river." The exercise of such a privilege is subject to Maryland regulatory authority because that authority is an inherent part of, and incidental to, a State's ownership of the riverbed on which the wharf or pier is to be placed, and Maryland is the owner of the Potomac, including the land underlying the river, as Virginia recognized in its own Constitution and as subsequently confirmed in the Black-Jenkins Award. Maryland has acted properly in regulating the Potomac as it has for more than two hundred years because the Compact does not address, much less in any way restrict, Maryland's broad authority over property within

its territory, which includes the power to regulate the placement by Virginia citizens of wharves and improvements beyond the low-water mark in the Maryland portion of the river.

A. This Case Is Controlled By The Presumption That Maryland Has The Right, As The Owner Of The Potomac, To Regulate Access To The River.

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away." *McCready v. Virginia*, 94 U.S. 391, 394 (1876). This principle is reinforced by a "strong presumption of state ownership" because "navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). The "ownership of this land was considered an essential attribute of sovereignty," *Utah Division of State Lands v. United States*, 482 U.S. 193, 195 (1987); *see also Idaho v. United States*, 121 S.Ct. 2135, 2142 (2001) (citing cases), because "title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes. . . ." *Utah Division of State Lands v. United States*, 482 U.S. at 195. *See also Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1894). Such "control over the property underlying navigable waters is so strongly identified with the sovereign power of government," *Montana v. United States*, 450 U.S. 544, 552 (1981), that "a presumption against their separation from sovereignty must be indulged. . . ." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283-84. This presumption applies "in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself," *United States v. Oregon*, 295 U.S. 1, 14 (1935), and is applicable here, as Maryland's ownership of the river is undisputed and its right to regulate the construction of wharves and other improvements beyond the low-water

mark on the Virginia side of the Potomac is a fundamental feature of Maryland's sovereign control over the river. Virginia is unable to overcome this presumption and cannot demonstrate that Maryland divested itself of its sovereign right to regulate access to the Potomac when it ratified either the Compact or the Black-Jenkins Award.

Maryland's territorial claim over the Potomac derives from the charter granted on June 20, 1632 from King Charles I to Cecilius Calvert, Lord Baltimore. As the Court long ago recognized, that grant "in unmistakable terms included the Potomac River, . . . and declared that thereafter the province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, 'from which we do separate both the said province and the inhabitants thereof.'" *Morris v. United States*, 174 U.S. at 223 (quoting Maryland charter). While King James II in 1688 purported to give by patent to Lord Culpeper territory that also included the Potomac River, "the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never devested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper." *Id.* at 225.

Rather than claim any rights of government in the Potomac, Virginia expressly disavowed any such assertion of sovereignty in its first Constitution of June 29, 1776. Explicitly acknowledging the rights of Maryland and several other States to the territories described in the charters establishing those colonies, the Commonwealth stated that those territories "are hereby ceded, released, and forever confirmed to the people of those colonies, respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia . . . ." *Maryland v. West Virginia*, 217 U.S. 1, 23 (1910) (quoting Virginia Constitution). *See also*

Virginia v. Tennessee, 148 U.S. 503, 509 (1893) (stating that "on the 6th of May, 1776, the state of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina, and South Carolina were thereby ceded and forever confirmed to the people of those colonies, respectively."); *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. 543, 558 (1823). In contrast to this broad relinquishment of any claim of property, jurisdiction, government, and any other right that Virginia might have asserted with respect to the territories of all of these States, Virginia reserved only limited claims with respect to two rivers, namely, "the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Tidewater Exhibit 19.

While James Madison, upon learning of Virginia's broad renunciation of any rights or claims over the Potomac, wrote Thomas Jefferson decrying the Commonwealth's "entire relinquishment of the Jurisdiction" of the river, Tidewater Exhibit 34, the Maryland legislature rejected even the limited claim Virginia made with respect to the Potomac, declaring that "the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore;" that "the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter belongs to this state; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such

part of the river Pocomoke as is comprehended in the said charter, belongs to this state. . . ." Tidewater Exhibit 20.

Thus, as the drafters of the Compact came to Mt. Vernon in 1785, the two States' claims to the Potomac conflicted only as to (1) ownership of the Virginia shore, and (2) Virginians' use and navigation of the river. Beyond the Virginia shore, Maryland's authority to exercise its "rights of property, jurisdiction, and government" was undisputed from the perspectives of both States. Given that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Alderman of New Jersey*, 209 U.S. 473, 593 (1908), Maryland had broad powers of government over the Potomac at the time it formed the Compact with Virginia in 1785, as its "ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.'" *Idaho v. United States*, 121 S.Ct. at 2142. This power included the authority to regulate the construction of wharves and other improvements in the Potomac.

While "[w]harves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times," *Dutton v. Strong*, 66 U.S. 23, 31-32 (1861), "[b]y the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or seized and rented for his benefit, if it is not a nuisance to navigation." *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). Following the American Revolution, such activity remained, as it had been before, "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public." *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870). The "legislature" responsible for regulating

this activity is the legislature of the State that owns the riverbed, as "title necessarily carries with it control over the waters above them, whenever the lands are subjected to use." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452.[14] This control includes such regulation or "control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger. . . [T]he control which the State exercises over them is such as to secure at once their usefulness and their safety." *Atlee v. Packet Co.*, 88 U.S. 389, 393 (1874). *See also Norfolk City v. Cooke*, 68 Va. 430, 434 (1876) ("These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads . . ., subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured.").

Thus, at the time it formed the Compact with Virginia, Maryland had well-settled sovereign authority over the Potomac and the construction of wharves and other improvements in the river. *See also Dutton v. Strong*, 66 U.S. at 32 ("the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time"); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875, 880 (1904) ("we think it well established that the right to build wharves is one which is subject to state regulation").

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[14] As set forth above and more fully below, Virginia has recognized that legislature to be Maryland's, and has on many occasions informed Virginia citizens that construction on the bed of the Potomac beyond low water mark falls within Maryland's regulatory jurisdiction. *See also* April 25, 1967 Va. Att'y Gen. Op. 48 (Exhibit CC-13) (recognizing that while the right to build a wharf or pier is subject to regulation, the lawful exercise of such a right does not change the Maryland/Virginia boundary line so as to alter jurisdiction over the sale of liquor by a restaurant built on a pier offshore Virginia).

Applying the appropriate rule of construction in cases such as this shows that Maryland's formation of the Compact retained these important powers of government.

B. The Compact Does Not Contain Any Language That Divests Maryland Of Its Right To Regulate Potomac River Access.

As the cases demonstrate, Maryland is presumed *not* to have relinquished any governmental authority over the exercise of Virginia citizens' "privilege of making and carrying out wharfs and other improvements" in the Potomac River. That presumption can be overcome only by clear, especial, or plain language to the contrary in the Compact, as Maryland's regulation of such a privilege is an essential part of its ownership of the Potomac and its "absolute right" – as the trustee for its citizens – "to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the constitution to the general government." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). *See also Yates v. Milwaukee*, 77 U.S. at 504. While the Compact addressed Virginia's interest in having access to the Potomac, it did nothing to change the Potomac River's location within the State of Maryland as set forth in the original 1632 charter from King Charles I. Under the presumption and rule of construction set forth in other comparable cases, the Compact does not contain any language that strips Maryland of its governmental authority over the Potomac originating in the 1632 charter that Virginia expressly recognized in its 1776 Constitution.

In *Massachusetts v. New York*, 271 U.S. 65 (1926), for example, the Court applied a rule of strict construction in holding that Massachusetts did not acquire any title to the bed of Lake Ontario by the Treaty of Hartford, in which New York granted to Massachusetts "the Right of pre-emption of the Soil from the native Indians and all other the Estate, Right, Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted)

which the State of New York hath" in the lake, and Massachusetts granted to New York "'all the claim, right and Title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction' in all the lands in controversy between the two states." *Id.* at 80, 85. The Court stated that "[t]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership." *Id.* at 89.

In applying that presumption and concluding that Massachusetts did not acquire private title to the bed of Lake Ontario, the Court observed that "[t]he right of Massachusetts and her grantees to use the waters of the lake was amply secured and protected by a clause of the treaty" providing that the citizens of Massachusetts shall "have and enjoy the same and equal Rights respecting the navigation and fishery on and in Lake Ontario . . . as shall from time to time be had and enjoyed by the Citizens of the State of New York." *Id.* at 88. Stating that "a grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over navigable waters of the state and on the free use of the principal waterway of the newly settled territory," *id.*, the Court held that "all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." *Id.* at 89.

Similarly, in upholding New Jersey's right under a compact it formed with New York to tax land in New York Bay on the New Jersey side of the boundary between the two States established by the compact, "but under the 'exclusive jurisdiction' of New York, subject to

the exclusive right of property in New Jersey," *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 478 (1908), the Court took the same approach described above, stating that "boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly applies." *Id.* at 479. Rejecting the argument that a "different meaning does appear in the article (3) [of the compact] that gives New York exclusive jurisdiction over this land as well as the water above it," *id.*, the Court asserted "we agree with the state courts that have been called on to construe that part of the agreement, that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1," *id.*, which established the boundary between New Jersey and New York. *See also United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (holding that the United States had not waived its sovereign interest in its navigational servitude in submerged lands when it entered into a treaty with the Choctaw Indian tribe of the sovereign Cherokee Nation conveying title to those lands); *Nicoulin v. O'Brien*, 248 U.S. 113, 114 (1918) ("And we think it clear that no limitation upon the power of [Kentucky] to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."); *Martin v. Waddell*, 41 U.S. at 414 ("it would require very plain language in these letters-patent, to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away").

As these cases show, Virginia must point to unambiguous language in the Compact demonstrating that Maryland intended to separate, and then surrender, its right to regulate

wharves and other improvements from the bundle of other rights accompanying its ownership of the lands beneath the Potomac. *See also Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (citing well-established canon of contract construction that no sovereign power will be considered surrendered absent clear and unambiguous language set forth in "unmistakable terms") (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 548 (1837) ("[W]henever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."). *See generally United States v. Winstar*, 518 U.S. 839, 871-79 (1996). Indeed, "if the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty" and "intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 41 U.S. at 416.

No such appropriate terms exist here, nor does this case involve language that could be characterized as ambiguous. While "a grant by a state having plenary power to make it, of the rights and title of government and sovereignty over a specified territory, . . . carries with it, as an incident, title to lands under navigable waters," *Massachusetts v. New York*, 271 U.S. at 89, the Compact "in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words,' or 'definitely declared or otherwise made very plain.'" *Montana v. United States*, 450 U.S. at 554 (citations omitted). The Compact simply does not contain any language remotely suggesting that Maryland

transferred to Virginia any authority over the construction of wharves and other improvements in the Potomac. Absent such a provision, no such transfer of authority can be assumed. *See also Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861) ("[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.").

Nor does the Compact confer on Virginia citizens an unrestricted "privilege" of constructing improvements in the river. First, although Maryland clearly contemplated from the plain language of the Compact that wharves and piers would be built from the Virginia side of the Potomac, "[t]here is nothing in their presence to indicate an abandonment by the Sovereign of title to the soil. . . [R]iparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state." *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934). Observing that "Article 7 gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves etc., but left the question of boundary open to long continued disputes," the Court in *Smoot Sand & Gravel Corp. v. Washington Airport*, 283 U.S. 348, 351 (1931), concluded that such "private ownership does not affect State boundaries" and that the use of the word "shores" "is merely a topographical indication and imports nothing as to the sovereignty over them." *Id.* Maryland's mere recognition that the "citizens" of Virginia would have the "privilege" of building wharves and other improvements into the Potomac, like Delaware's "approval" of identical construction in the Delaware River, *New Jersey v. Delaware*, 291 U.S. at 375, gives rise to "no legitimate inference" that either Maryland or Delaware relinquished its "title to the stream up to the middle of the channel or even the soil under the

piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *Id.* at 376.

Second, even if an inference could be drawn that Maryland intended to give Virginia citizens (as opposed to the Commonwealth) the uncontrolled right to build wharves and piers, Maryland could not confer such a right, as "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 453. The absence of any Compact language designed to effect a blanket surrender of Maryland's sovereignty is not inadvertent, as "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914). *See also Stone v. Mississippi*, 101 U.S. 814 (1879); *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848). *See generally United States v. Winstar Corp.*, 518 U.S. at 874 & n.20, 888-89 & nn.33 and 34.

The Compact's qualification of Maryland's regulatory authority in other respects underscores the absence of any intention to relinquish Maryland's regulatory authority over the construction of wharves and other improvements in the Potomac. For example, Article VIII expressly requires the "mutual consent and approbation of both states" in passing "laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and

navigation thereof. . . ." Similarly, Article X specifically conditions the exercise of the "jurisdiction of each state over the river Patowmack" with respect to certain "piracies, crimes or offences," depending on where they occur and the citizenship of both the victim and the criminal. Conversely, Article VII of the Compact makes no reference to the laws of either State, nor does it even hint that one State rather than the other will have "jurisdiction" over the exercise of the "privilege" described in that provision. Absent such language, the rights of sovereignty remain with Maryland.

Virginia's claims fail, therefore, because the Compact imposes no restrictions of any kind on Maryland's authority, as the owner of the waters and beds of the Potomac, to subject an individual's right "to make a landing, wharf, or pier . . . to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 445-46. That authority was not unique to Maryland at the time the Compact was formed but rather is a power of all sovereign entities, as Virginia's own courts have recognized, *see, e.g., Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 880; *Norfolk City v. Cooke*, 68 Va. at 434, and, like any governmental power, may not be deemed relinquished "in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings*, 29 U.S. 514, 561 (1830). Virginia's challenge to Maryland's assertion of authority over construction activity in the Potomac should be rejected because Maryland has not manifested in any portion of the Compact any purpose to abandon such regulatory power.

The absence of such a purpose to relinquish that authority – and the need for it to be stated in clear and unequivocal language to have any effect at all – is perhaps best understood by the history preceding the Compact's formation. While Virginia has argued previously in

this case that the boundary between the two States was in dispute as of 1785, Virginia had nine years earlier in its Constitution explicitly "ceded, released, and forever confirmed to the people of" Maryland "all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia" with respect to the territory described in the Maryland Charter, and reserved only limited navigation, access, and property claims concerning the Potomac. The presence of similar language in the Treaty of Hartford in which Massachusetts recognized New York's "Government Sovereignty and Jurisdiction" over the bed of Lake Ontario was sufficient to divest Massachusetts of title to that land, notwithstanding that Massachusetts, unlike Virginia in its Constitution, retained the significantly more sweeping "right of preemption of the soil" and "the estate, right, title and property," *Massachusetts v. New York*, 271 U.S. at 85, in the land in question. The concession made by Virginia in its Constitution, and Maryland's strongly worded response at its next legislative session challenging even the limited claim that Virginia asserted with respect to the Potomac, demonstrates that both States understood the extent of Maryland's claimed ownership and sovereignty over the river. The Compact contains no language that remotely suggests the States intended to alter this basic understanding, by simply providing that the citizens of each State would have "full property" in the shores of the Potomac adjoining their lands and the privilege of building wharves and other improvements thereon.

Even if ownership of the Potomac were in dispute at that time, despite the plain statements to the contrary made in Virginia's Constitution and the Maryland legislative session, the Compact does not strip Maryland of any regulatory authority over the exercise of access rights. Rather, the Compact did not resolve any boundary issues but only

recognized a privilege to build wharves, wherever the boundary was, without stating anything about which State could regulate the exercise of such a privilege. Thus, even if the States disagreed on the location of the boundary at the time the Compact was formed and elected to leave that question for another day, the Compact neither divests Maryland of, nor vests Virginia with, any regulatory authority. As demonstrated by the language found in Virginia's Constitution, Maryland's 1776 legislative response, the Treaty of Hartford, and other contemporaneous historical documents, *see* Rakove Aff. (Exhibit A) at 13-20, the States were well aware of the differences between the words "property, jurisdiction, government, and sovereignty." The mere recognition of a "privilege of making and carrying out wharfs and other improvements" simply does not, by itself, operate to strip Maryland of, or imbue Virginia with, any jurisdictional, governmental, or sovereign rights over the exercise of such a privilege.

Nor does such a privilege confer, as Virginia alleges in its Complaint, any unilateral and unrestricted right upon Virginia or "her riparian communities" "to withdraw water from the Potomac River. . . ." Complaint ¶ 46. First, Maryland's ownership of the Potomac River bed and waters to the low water mark confirms that Maryland has the authority to regulate the reasonable use, including the withdrawal, of water from a river within its own boundaries. Indeed, as Virginia's highest court has stated, "the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state . . . ." *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 879. That control includes the authority to regulate the appropriation of waters within that State's boundaries. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) ("as to every stream within

its dominion a state may . . . permit the appropriation of the flowing waters for such purposes as it deems wise"); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (recognizing State's police power to regulate water withdrawals within its boundaries, while striking down Nebraska's reciprocity requirement as discriminating against interstate commerce in appropriated groundwaters).

Second, neither Virginia nor its "riparian communities" have any riparian right to withdraw water from the Potomac. Rather, such a right belongs only to the individual property owner. Indeed, in Virginia, as in many other States, "[w]hile a riparian owner is entitled to a reasonable use of the water, he has no right to divert it for use beyond his riparian land . . . ." *Town of Purcellville v. Potts*, 179 Va. 514, 521, 19 S.E.2d 700, 703 (1942). Recognizing that "[t]he use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right," *id.* (quoting *Pernell v. City of Henderson*, 220 N.C. 79, 16 S.E.2d 449, 451 (1941) (other citations omitted), "[t]he weight of authority * * * holds a municipal corporation civilly liable for diverting the waters of a private watercourse for the purposes of a public water supply, either with or without legislative authority." *Id. See also Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508 (1921).

This rule is based on the rationale that "giving an individual the right to consume water for his domestic needs is founded upon the needs of the single individual and the possible effect which his use will have on the rights of others, and cannot be expanded so as to render a collection of persons numbering thousands, and perhaps hundreds of thousands, organized into a political unit, a riparian owner, and give this unit the right of the natural unit." *Pernell v. City of Henderson*, 220 N.C. 79, 16 S.E.2d at 451 (quoting *Farnham*, Water

and Water Rights, Vol. 1, at 611). Accordingly, "[t]here is little, if any, dissent from the generally accepted view that riparian status does not entitle a municipality to abstract stream water for distribution to its inhabitants for domestic purposes." *Oklahoma Water Resources Board v. Central Oklahoma Conservancy District*, 464 P.2d 748, 755 (Okl. 1969). *Cf. Atlee v. Packett Co.*, 88 U.S. at 394 (rejecting contention that "at any place where a riparian owner can make . . . a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of his ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed").

While there is no riparian right to withdraw water on behalf of non-riparian owners, Maryland has long sought to accommodate Virginia's need for water. Maryland follows the "reasonable use" doctrine, which allows for any use of water – even non-riparian uses – so long as that use is reasonable and does not harm other users or the aquatic environment. *See generally* COMAR 26.17.06.02B. The evidence discussed below demonstrates that, within the Maryland system, Virginians enjoy the same rights as Marylanders and are treated similarly. The Compact does not, however, give Virginians any greater access rights than those possessed by Marylanders.

C. Post-Compact History Further Substantiates Maryland's Broad Authority Over The Potomac.

1. Contemporaneous evidence shows that Maryland retained the right to regulate.

Maryland's interpretation of the Compact also finds support in the "contemporaneous construction of it and usage under it for more than a century . . . ." *Massachusetts v. New York*, 271 U.S. at 87. Maryland's understanding that it retained the authority to regulate

wharves and other improvements in the Potomac was reflected in the law that Maryland passed just six years after the Compact was formed, in which it ceded part of Maryland's territory, which included a portion of the Potomac, to the United States for the location of the seat of the federal government. A provision of that law, which was enacted December 19, 1791, vested commissioners appointed by the President with specific licensing authority over wharves built in the Potomac, stating that they "have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner and extent, they may judge durable, convenient and agreeing with general order; but no license shall be granted to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid. . . ." *Morris v. United States*, 174 U.S. at 282 (quoting Kilty's Laws of 1791, ch. 45, § 12, attached as Exhibit CC-1).

This legislation was enacted during the same historical time period in which the Compact was formed and evinces Maryland's clear understanding that it had the right to regulate the building of wharves and other improvements in the Potomac, regardless of the side of the river on which the construction took place. The law unambiguously demonstrates that Maryland's authority existed not simply in "the Eastern Branch" on Maryland's side, but also in "the waters of the Potomac." Indeed, the law's description of the property Maryland ceded to the federal government makes plain that "the waters of the Potomac" extended to Virginia's side of the river:

> beginning at Jones's Point, being the upper point of Hunting Creek, in Virginia, and at an angle in the outlet of forty-five degrees west of the north, and running a direct line ten miles for the first line, then beginning again at the same Jones's Point, and running another direct line at a right angle with the first, across the Patowmack, ten miles, for the second line, then from the terminations of the said first and second lines, running two other direct lines ten miles each, the one crossing the Eastern Branch and the other Patowmack, and meeting each other in a point; which has since been called the Territory of Columbia.

Exhibit CC-1. *See also United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 354 (1933) (stating in a case involving the proposed construction of a wharf from the Virginia side of the Potomac "it is conceded that the bed of the river below high-water mark, where the proposed wharf is to be built, lies within the District of Columbia, and that title to it and sovereignty over it were vested in the United States by cession from the state of Maryland of the area constituting the present District of Columbia").

Maryland's understanding that it had and was transferring to the commissioners of the District of Columbia the authority to regulate the construction of wharves and other improvements was shared by the commissioners, who adopted a regulation in 1795 providing in pertinent part:

> The Board of commissioners, in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, and to regulate the materials, the manner and the extent thereof, hereby make known the following regulations:
>
> That all proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the eastern branch as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters. . . The buildings on said wharves to be subject to the general regulations for buildings in the city of Washington. . . .

Morris, 174 U.S. at 283. *See also Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co.*, 109 U.S. 672, 675-76 (1884).

The same understanding extended to Maryland's jurisdiction over water withdrawals

from the Potomac. While there was no formal permitting system in place at the time, the regulation of water rights that occurred through the courts and the legislature took place entirely under Maryland's jurisdiction. When the United States in 1853 first sought access to the Potomac "for the purpose of bringing water into the city of Washington," it came to Maryland for authorization. *See* Acts of Congress of 1852, ch. 97, March 3, 1853 (authorizing the expenditure of funds for the project and providing that "if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained"). Maryland agreed, passing "An Act giving the assent of the State of Maryland, to such plan as may be adopted by the President of the United States, for supplying the City of Washington with Water." 1853 Md. Laws Ch. 179. It is this law that, even today, serves as the basis for the federal government's water rights in the non-tidal Potomac.

The development of the District of Columbia water supply system highlights the same understanding by both Maryland and Virginia concerning Maryland's jurisdiction over the Potomac. In its 1853 legislation, Maryland gave its approval for all aspects of the Washington Aqueduct, including "such dams, reservoirs, buildings and other works . . . as may be necessary for the said purpose [of bringing water to the District]." 1853 Md. Laws Ch. 179, § 1. By contrast, the Virginia law passed in connection with the construction of the Aqueduct is limited to providing consent for the United States' acquisition of "land necessary for an abutment and quarries for the construction of a dam across the Potomac." 1854 Va. Laws Ch. 5.

The Washington Aqueduct project also reveals how other Maryland institutions regulated water rights in the Potomac. When the Great Falls Manufacturing Co., a Virginia

corporation, sued to press its claims to water rights in the Potomac against the Aqueduct's withdrawals, it went to the Circuit Court for Montgomery County, Maryland. *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland, *reprinted as* Sen. Doc. 42, 35th Cong., 2d Sess. (1859), Tidewater Exhibit 85. Having lost in Maryland's courts, the Company then sought to secure water rights to the Potomac in the Maryland Land Office by taking out a patent to the water within the Potomac between Conn's Island and the Virginia shore, called *Neilson's Desire*. *See United States v. Great Falls Manufacturing Co.*, 21 Md. 119 (Md. 1864). In the litigation surrounding this patent, no party questioned that Maryland had the authority and jurisdiction to patent the submerged lands beneath the Potomac. *See id.* at 123 (assertion of the United States that "[t]he right of the State originally to grant the land sought to be patented, is conceded on all sides"), 127 (assertion of the Great Falls Manufacturing Company that "[t]he title of the State of Maryland to the land at the bottom of the Potomac River to high water mark on the Virginia shore, and her right to grant portions of it not yet granted by patent or otherwise, is too firmly settled to be questioned now").

Thus, ample historical evidence shows that, from the time the Compact of 1785 was formed until Maryland and Virginia's adoption of the Black-Jenkins Award ninety years later, Maryland, the United States, Virginia and others understood that Maryland retained sweeping regulatory authority over the Potomac River.

2. Maryland and Virginia have consistently recognized the boundary set forth in the Black-Jenkins Award as an absolute line of sovereignty.

a. The Award conclusively established Maryland's ownership and authority over the river and its beds up to the low-water mark.

The Black-Jenkins Award subsequently confirmed not just Maryland's view that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. at 478, but also Virginia's understanding that Maryland's regulatory authority over the Potomac extended to the low-water mark on the Virginia side of the river. While the Black-Jenkins arbitrators determined that "Virginia has a proprietory right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership" (App. 29a), they rejected the Commonwealth's argument that, in addition to having "rights on the river[,] . . . she acquired, or that Maryland lost, the islands or the bed of the river. . . ." (App. 30a.) In dismissing that argument and determining that the boundary between the two States was the low-water mark on the Virginia side of the river, the arbitrators also rejected the offer of settlement that Maryland had made earlier in the proceedings to draw the boundary around all of the wharves and piers built out from the Virginia side. *See* Ex. 121 to Virginia's Motion for Partial Summary Judgment. Thus, "the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore," *Morris v. United States*, 174 U.S. at 218, because Maryland's ownership of the Potomac, including the riverbed, was deemed to extend to the low-water mark, even when a wharf or pier is built beyond that point.

Although the Black-Jenkins Award did not explicitly state that the sovereign authority

flowing from Maryland's ownership of the bed of the Potomac extended to wharves and other improvements built from the Virginia side of the river, the meaning and interpretation of the Award in this regard are confirmed by the "practical construction of the boundary by the acts of the two states and of their inhabitants." *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933). Both States and their citizens have deemed the low-water mark as the boundary line of sovereignty in all respects. *See also Massachusetts v. New York*, 271 U.S. at 94 ("If any further support were required for the conclusion we reach, it is to be found in the practical construction by the two states of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and in long-continued acquiescence by Massachusetts in that construction."). The Award's subsequent interpretation by Maryland and Virginia confirm again that Maryland's ownership of the Potomac included the right to regulate Virginia's access to the river.

Since the time both States accepted the Black-Jenkins Award, and in recognition of the well-settled rule that "ownership of land under navigable waters is an incident of sovereignty," *Montana v. United States*, 450 U.S. at 551, each State for the last century and a quarter has "asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining state up to the line on the opposite side." *Virginia v. Tennessee*, 148 U.S. at 515. The conduct of both States reflect their clear understanding that, with the exception of the concurrent jurisdiction over fisheries provided for in the Compact, the boundary determination made in the Black-Jenkins Award was the dividing line of sovereignty with respect to all other areas and activities.

It did not take long for that conduct to occur. Just ten years after accepting the award, Maryland passed legislation making it unlawful for any person to dig, dredge, take, and carry

away any sand, gravel or other material from the bed of the Potomac between its mouth and the uppermost boundary line of Prince George's County, Maryland. *See* 1888 Md. Laws Ch. 362 (Exhibit CC-2). Conversely, Virginia has admitted that, although it "regulates all dredging, extraction or mining on state-owned bottomlands (submerged lands) through the Marine Resources Commission," Exhibit CC-15, Interrogatory Response No. 8, "[s]ince at least 1888, Virginia has not regulated mining, dredging, or extraction of materials from property located below the low-water mark of the Potomac River." Exhibit CC-16, Response to Request for Admission No. 162.

A substantial number of similar parallel assertions of authority/non-authority were made in the next century. From Maryland's perspective, a number of these assertions of jurisdiction derive from a Maryland law enacted in 1908 providing that the jurisdiction of any county bounded by waters that adjoined a neighboring State extended to the "ultimate limits" of Maryland "at the place in question." 1908 Md. Laws Ch. 487 (Exhibit CC-3). Since that time, Maryland and its political subdivisions have extended practically every type of police power authority that exists to the low-water mark on the Virginia side of the Potomac River, and have included within their broad regulatory sweep piers, wharves, and water intake pipes attached to Virginia, and activities that take place on structures build from the Virginia side. Conversely, as with its failure to regulate mining, dredging, or extraction activity with respect to the Potomac, Virginia has failed to exert any regulatory authority over the Potomac, subject only to the exception of the limited jurisdiction given it by the Compact of 1785 concerning fisheries and certain crimes. Indeed, the Commonwealth has not only recognized its lack of authority but has also asked Maryland to exercise its regulatory power over property and activity on the Virginia side of the river but beyond

Virginia's jurisdictional reach.

b. Taxation.

A State's "taxing power" is "one of the primary indicia of sovereignty." *Illinois v. Kentucky*, 500 U.S. at 385. Such a manifestation of a State's sovereignty has been found to be "particularly persuasive in prior cases." *New Jersey v. New York*, 523 U.S. at 792 (citing cases). Both States have long recognized that Virginia's taxation authority ends at the boundary line between the States and that Maryland's begins at that point. In response to a request for an opinion whether the Commonwealth could tax oysters taken from the Potomac River, the Virginia Attorney General more than 65 years ago responded that Virginia's "tax is confined to oysters taken from the public rocks, beds and shoals of the Commonwealth of Virginia and from oyster grounds leased by the Commonwealth. Since the bed of the Potomac is not owned by the State of Virginia and is not leased by the Commonwealth, I concur in the view you expressed in your letter that the Commission does not possess the authority to levy the tax in question upon oysters taken from the said river." June 21, 1935 Va. Att'y Gen. Op. 147 (Exhibit CC-9). This limitation is not confined to oyster taxes. Rather, as Virginia has stipulated, "Virginia has not imposed any sales or use, litter, entertainment, personal property, or income tax on activities that take place in the Potomac River, or on structures located in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 13.

Virginia has recognized a similar jurisdictional limitation with respect to the imposition of real property taxes. In its response to Maryland's interrogatories, Virginia asserts that its "localities along the Potomac River are authorized to impose a property tax on real property, structures and improvements that extend from the Virginia shore of the

Potomac River," and that the localities "are authorized to include in the value of real property subject to local taxation the value of any structures appurtenant to such property that extend beyond the low-water mark across the Virginia/Maryland line." Exhibit CC-15, Response No. 10. As shown by documents produced by those localities, however, they do not tax structures and improvements that extend beyond the low-water mark into Maryland when the structures and improvements are not simply a pier or a wharf but rather are property, such as a restaurant or tavern, that has value independent of the land in Virginia to which the structure is attached. In contrast, Maryland does tax those properties when they are on the Maryland side of the boundary.

For example, Flanagan's of Colonial Beach, Inc. is the owner of a restaurant built on a pier offshore Colonial Beach, Virginia on Maryland's side of the boundary line. The Westmoreland County, Virginia Commissioner of the Revenue in the year 2001 assessed only the land owned by Flanagan's on the Virginia shore; the Commissioner did not include the restaurant in that assessment. Exhibit CC-38. Conversely, the Department of Assessments and Taxation for Charles County, Maryland taxes the building housing the restaurant, and has been taxing this property since at least 1957. *See* Declaration of Robert C. Farr, Exhibit F, ¶¶ 15-20 and Farr Exhibits 10-14.

Similarly, the Coles Point Tavern is built on pilings and piers offshore Coles Point, Virginia. The Westmoreland County, Virginia Commissioner of the Revenue in the year 2001 assessed the land at $80,000, and the total improvements at $2,800. Exhibit CC-38. The Department of Assessments and Taxation for St. Mary's County, Maryland most recently assessed the land at $1,000, and the improvements at $84,300, and has been taxing this property since at least 1961. *See* Declaration of James W. Spence, Exhibit H, ¶¶ 3-7 and

Spence Exhibits 1-4.

Maryland has also taxed other properties extending from the Virginia side of the river dating back to at least 1952. *See* Farr Decl., Exhibit F, ¶¶ 5-14 and Farr Exhibits 1-9; Declaration of Edward C. Papenfuse, Exhibit W, ¶¶ 24–32, 38, 40-41 and Papenfuse Exhibits 17-24, 29, 31-32. Maryland was unable to locate during discovery, however, any documents showing that Virginia has ever taxed these properties, and, as stated previously, Virginia has acknowledged that it has not imposed any other taxes on any activities or structures in the Potomac on the Maryland side of the boundary line. In contrast, since at least 1951, Maryland has imposed sales, entertainment, personal property and other taxes on businesses built on piers and wharves extending from the Virginia side of the river. *See* Declaration of James Loftus, Exhibit J, and Loftus Exhibits 1-9; Declaration of Edward Muth , Exhibit I, and Muth Exhibits 1-17; Declaration of Joseph W. Norris , Exhibit G, and Norris Exhibits 1-6; Papenfuse Decl., Exhibit W, ¶ 35-37 and Papenfuse Exhibits 27-29. Virginia has also stipulated that it "has not objected to Maryland's jurisdiction to impose any" of these taxes. *See* Exhibit CC-14, ¶ 14.[15]

c. Criminal laws and their enforcement.

Maryland and Virginia have also demonstrated in the area of criminal law enforcement their same understanding that the boundary line set forth in the Black-Jenkins Award represents the line at which Virginia's sovereignty ends and Maryland's begins. In 1944, Virginia Governor Colgate W. Darden, Jr. requested the Commonwealth's Attorney

[15] Maryland has also enforced the tax obligations of these businesses by, among other means, seizing their liquor licenses or upholding the transfer of such licenses until the taxes are paid. *See, e.g.*, Declaration of Lisa Bailey, Exhibit K, ¶¶ 22-25, 39 and Bailey Exhibits 17-20, 41-44.

General, Abram P. Staples, to opine whether "the jurisdiction of the State of Virginia to enforce its criminal laws respecting slot machines extend[s] to offenses alleged to have occurred on the Potomac River." September 1, 1944 Va. Att'y Gen. 91 (Exhibit CC-10). The Attorney General responded that "the State of Virginia has no such jurisdiction." *Id.* Stating that "[b]y the Compact of 1785 between Virginia and Maryland, the territorial bounds of Virginia extend only to the low-water of the Potomac River on its southern or Virginia shore," the Attorney General declared that "[t]he consequent result is that the Potomac River lies wholly in the State of Maryland, and in the absence of any further legislative compact between the two states, the State of Virginia would have no criminal jurisdiction over the waters of the Potomac." *Id.* Acknowledging that one article of the Compact "does indeed make provision for concurrent jurisdiction of the two States over certain crimes under certain conditions," General Staples stated that "[t]his article, however, has reference only to offenses committed against the person." *Id.* Noting that "[o]peration of a slot machine is not an offense against a citizen of Virginia, but an offense purely against the State," the Attorney General concluded that "the State of Virginia has no jurisdiction to enforce the slot machine statutes on the waters of the Potomac River." *Id.* at 92.

Four years later, Virginia Attorney General J. Lindsay Almond, Jr. issued an opinion stating that Virginia has no jurisdiction over that portion of a pier built from the Virginia side of the Potomac that extends beyond the low-water mark. The issue before him was triggered by an individual's sale of beer on a pier "which is clearly fastened to the Virginia shore. . . ." July 13, 1948 Va. Att'y Gen. Op. 118 (Exhibit CC-11). Quoting from the letter of the Attorney for King George County who raised the issue, the opinion states that "[a]n ordinance in this county forbids the sale of beer on Sunday – but in Maryland it is legal."

After quoting the Virginia law that declares the boundary between the two States is the low-water mark, the Virginia Attorney General stated, "[w]hile the above section also provides that the citizens of Virginia shall have full property in the southern shores of the Potomac river and the privilege of building piers so long as navigation is not obstructed, it can be seen that the territorial jurisdiction of the Commonwealth ends at the low-water mark." *Id.* "Therefore, it is my opinion that that portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth." *Id.*

During the same time period in which Virginia's Attorneys General issued these opinions, the Maryland General Assembly enacted legislation legalizing slot machines in Charles and St. Mary's Counties. *See* 1947 Md. Laws, Extra Session, Ch. 32; 1949 Md. Laws Chs. 417 and 678; 1951 Md. Laws Chs. 181 and 183. Due to Virginia's lack of jurisdiction over slot machine activities that occur over the Potomac and on piers that extend from Virginia beyond the low-water mark, a number of taverns and restaurants featuring slot machines were constructed on piers affixed to the Virginia side of the Potomac but on Maryland's side of the boundary line. These establishments became controversial because slot machines were unlawful in Virginia and these businesses were "extensively patronized by Virginia residents and others who resort thereto from the Commonwealth." *Miedzinski v. Landman*, 218 Md. 3, 8, 145 A.2d 220, 222 (1958).

Recognizing that Maryland had authority to regulate activity taking place on piers and wharves extending from Virginia's shore beyond the low-water mark *and* that Virginia lacked the power to control that activity, Virginia's Governor (and former Attorney General) J. Lindsay Almond, Jr. sought Maryland's assistance to prohibit the activity. In 1958,

Maryland responded by enacting very specific legislation, making unlawful gambling activity taking place on piers and wharves built over Maryland waters that could not be entered from the shores of Maryland by foot. As set forth in a case in which the owners and operators of these businesses challenged the lawfulness of this statute, "the Governor of Maryland recommended to the [Maryland] General Assembly the passage of the legislation in question, upon the formal request of the Governor of Virginia." *Miedzinski v. Landman*, 218 Md. at 8, 145 A.2d at 222. *See also* Exhibit 6 to Papenfuse Decl., Exhibit W (trial court opinion discussing same request). The Maryland Court of Appeals upheld the validity of the legislation, thus ending the slot machine activity that Virginia's Attorney General 14 years earlier stated Virginia did not have jurisdiction to regulate. A newspaper article covering that decision stated, "[f]ollowing the announcement of the Appeal Court's action, Virginia's Governor J. Lindsay Almond, Jr., said: 'While I have not seen the opinion, I feel it is a wholesome decision and I again applaud the Maryland General Assembly for taking constructive action in enacting laws to control a situation which was beyond the control of Virginia.'" The Baltimore Sun, "Court Bans River Slot Machines," October 15, 1958, Exhibit 7 to Papenfuse Decl., Exhibit W.

The slot machine controversy is just one of many examples demonstrating the manner in which the two States have recognized the boundary identified in the Black-Jenkins Award as the line marking the end of Virginia's law enforcement authority and the beginning of Maryland's. As Virginia has stipulated, "[s]ince at least 1900, Virginia's statutory laws have not provided for general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 7. Indeed, Virginia acknowledges that, during

the same time frame, it "has not exercised general criminal jurisdiction" over such crimes. *Id.*, ¶ 8. Virginia also stipulates that, as with the slot machine issue, it "has not objected to Maryland's exercise of its general criminal jurisdiction over" these crimes. *Id.*, ¶ 9. On the contrary, Virginia has benefitted from Maryland's exercise of jurisdiction to accomplish what Virginia's criminal jurisdiction did not enable it to do.

In *Traverso v. Commonwealth*, 6 Va.App. 172, 366 S.E.2d 719 (1988), for example, the Virginia Court of Appeals reversed a criminal defendant's murder conviction and sentence of life imprisonment and held that Virginia lacked criminal jurisdiction because the decedent's body was found in Maryland between six and seven and one-half feet from the Virginia side of the Potomac River. Maryland subsequently prosecuted and convicted the defendant of first-degree murder, and his conviction was affirmed on appeal by the Maryland Court of Special Appeals, which rejected his argument that "there was insufficient evidence to support the [trial] court's determination that the murder occurred in Maryland, so as to establish its territorial jurisdiction over the prosecution for this crime." *Traverso v. Maryland*, 83 Md.App. 389, 396, 574 A.2d 923, 926 (1990).

Virginia authorities have also recognized the boundary as the jurisdictional line at which their law enforcement authority ends with respect to crimes that occur on piers and wharves built from the Virginia side on Maryland's side of the boundary. In September of 1989, William F. Bruton, Jr., the Town Manager of the Town of Colonial Beach, Virginia, wrote a letter to the President of the Commissioners of Charles County, Maryland requesting "a relinquishing of sovereign rights over the pier by Charles County and the State of Maryland." Exhibit 1 to Declaration of Fred Davis, Exhibit B. Stating that "the Town owns a public pier which was built out into the Potomac River, many decades ago," Mr. Bruton

asserted that "[b]ecause of its location, in Maryland waters, even though it is attached to Virginia soil, the Town does not have jurisdiction over crimes committed on 80% of the structure. Our Police are not able to make arrests, even when they personally witness illegal acts taking place on the pier. This has obviously created a severe law enforcement problem in the Beach." *Id.*

The law enforcement problem that Mr. Bruton referred to in his letter related to the amount of time it would ordinarily take the Charles County Sheriff's office to respond to reports of crimes occurring on the pier. That office, like the St. Mary's County Sheriff's office and other Maryland law enforcement agencies, had long been and still is responsible for enforcing Maryland's criminal laws with respect to criminal activities occurring past the low-water mark on piers and wharves built from the Virginia side of the Potomac. *See* Davis Decl., Exhibit B; Declaration of Francis "Buddy" Garner, Exhibit C; Declaration of Richard Voorhaar, Exhibit D; Declaration of Dennis I. Leland, Exhibit E. While access to the crime scene by boat could be relatively prompt, access by car would often take much longer. The Town thus requested a transfer of sovereign authority so that it "would be able to extend its police powers over the entire pier, and take the responsibility for prosecuting all violations of the law. In return, Charles County would not be forced to drive forty miles to respond to pier problems." Exhibit 1 to Davis Decl., Exhibit B. Mr. Bruton stressed, however, that "[t]he Town is not requesting jurisdiction over any other property in Maryland waters. Private businesses are able to hire their own security and do pay taxes to Maryland for police protection." *Id.* Stating that "[w]ithout our police force, the pier ends up being a lawless area without an enforcement authority for thirty to forty minutes," *id.*, Mr. Bruton enclosed a resolution "passed unanimously by the Town Council of Colonial Beach . . . ." *Id.* at 2.

The resolution, as does Mr. Bruton's letter, affirmatively states that "Town police officers do not have jurisdiction over property which lies in Maryland, and therefore can only exercise their authority over the western one-third of the Town's own pier." *Id.* at 3. The Town Council accordingly "authorize[d] the Mayor to make a request to the Charles County Board of Commissioners and the Governor of Maryland, asking that the State of Maryland relinquish its sovereign rights over the Colonial Beach Municipal Pier." *Id.*

While the Charles County Administrator subsequently responded that Charles County did not have sovereign rights that it could relinquish, as those rights belonged to the State and so the Town of Colonial Beach needed to discuss the issue with Maryland, Exhibit CC-28, the Commissioners and Sheriff of Charles County in 1998 entered into a Memorandum of Understanding with the Town of Colonial Beach and the Colonial Beach Police Department delegating to the latter certain law enforcement authority over activities occurring on the Colonial Beach Town Pier on the Maryland side of the Maryland/Virginia boundary. *See* Exhibit 2 to Davis Decl., Exhibit B. The Commissioners and Sheriff of Charles County the following year entered into a similar Memorandum of Understanding delegating to the County and Sheriff of King George County, Virginia law enforcement authority over activities taking place on the Fairview Beach Pier, again, on the Maryland side of the Maryland/Virginia boundary. Exhibit 3 to Davis Decl.

d. Licensing activities.

Both States have also recognized that the jurisdictional dividing line set forth in the Black-Jenkins Award marks the point at which Virginia's general police power authority terminates and Maryland's starts. Responding to an inquiry made in 1906 whether Virginia could license a boat upon which alcohol was believed to be sold while on the Potomac, an

assistant to the Virginia Attorney General stated that no such licensing authority existed because the boat was anchored below the low water mark on the Virginia side of the river and thus on Maryland's side of the boundary line. "I am, therefore, of [the] opinion that the Potomac river beyond low water mark is not Virginia territory, hence this State has no legal right to impose a license for the conduct of any business carried on outside of her territory. From this it necessarily follows that this State can neither require a license to sell, or prohibit the sale of, liquor on a vessel of any kind habitually anchored below low water mark." July 2, 1906 Va. Att'y Gen. Op. 87 (Exhibit CC-8). Stating that "[t]here are agreements by compact and concurrent legislation between the States of Virginia and Maryland, as to fish and oysters, and the prosecution of certain offenses committed on the Potomac, but there is no provision as to the sale of alcohol," *id.*, the opinion concludes "that the State of Maryland has jurisdiction of this case, and the liquor laws of that State must control." *Id.*

Half a century later, the Virginia Attorney General recognized the same jurisdictional limitation in responding to a similar request concerning the scope of the Commonwealth's licensing authority over constructing waterfowl blinds on Maryland's side of the low water mark. Citing the boundary line between the States, the Virginia Attorney General in 1952 informed the Clerk of the King George County Circuit Court that "the Commonwealth of Virginia possesses no authority to regulate or license waterfowl blinds beyond the boundary and inside of the State of Maryland. Accordingly, it does not appear that you, as Clerk, have authority to issue Virginia licenses for waterfowl blinds outside of the Virginia boundary line in the Potomac River." July 30, 1952 Va. Att'y Gen. Op. 116 (Exhibit CC-12). Fifteen years after issuing that opinion, the Virginia Attorney General reiterated the Commonwealth's lack of alcohol licensing authority over a restaurant built on a pier, stating that even though the

restaurant owners contemplated filling in and construction beneath the pier, "an artificial change in the low-water mark, occasioned by an owner in the lawful exercise of his right to construct a pier, would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (Exhibit CC-13).

Virginia's stipulations demonstrate that the same jurisdictional limitations on the Commonwealth's licensing authority that its Attorney General has recognized extend broadly to all exercises of Virginia's police powers, other than those embodied in the concurrent fisheries jurisdiction provision of the Compact. Indeed, as set forth in those stipulations, Virginia concedes that, "[s]ince at least 1900, Virginia has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 10. Virginia's interrogatory responses expand on this, stating that Virginia "does not presently enforce its laws relating to public safety, occupational safety, health, alcohol, gambling, gaming, hunting or fishing in that portion of the Potomac River that lies below the low-water mark of the Potomac River beyond the Virginia/Maryland line." Exhibit CC-15, Interrogatory Response No. 13.

Conversely, just as Virginia has recognized Maryland's exercise of its criminal law enforcement authority over piers, wharves, and activities taking place on the Maryland side of the boundary, the Commonwealth has also stipulated that "Virginia has not objected to Maryland's enforcement of any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 11. *See also id.*, ¶ 12 ("Virginia has not objected to Maryland's jurisdiction to issue liquor

licenses to structures located in the Potomac River on the Maryland side of the Maryland-Virginia line."). At approximately the same time that the Virginia Attorney General stated that the Commonwealth did not have authority to license duck blinds beyond the boundary line, Maryland authorities were issuing to business establishments located on piers and wharves affixed to the Virginia side of the Potomac River not simply licenses for the slot machines discussed earlier, but also trader's licenses, music box licenses, cigarette licenses, restaurant licenses, amusement licenses, dance licenses, vending machine licenses, billiards licenses, soda fountain licenses, liquor licenses, food service facility licenses, food and drink permits, and other licenses and permits. *See* Papenfuse Decl., Exhibit W, ¶¶ 2-17 and Papenfuse Exhibits 1-10; Declaration of Lisa Bailey, Exhibit K, and attached Exhibits; Declaration of Patricia Insley, Exhibit L, and attached Exhibits; Declaration of Janice C. DeAtley, Exhibit T, and attached Exhibits; Declaration of Elinor A. Mattingly, Exhibit V, and attached Exhibits; Declaration of Faye Gatton, Exhibit U, and attached Exhibits.

This licensing activity continues to the present and has expanded with the advent of new technologies. For example, since 1973, Maryland has issued licenses to sell Maryland lottery tickets to businesses built on piers and wharves adjacent to the Virginia side of the Potomac but on Maryland's side of the boundary line. *See* Declaration of Michael Williams, Exhibit M, and attached Exhibits; Declaration of Rick Forrester, Exhibit N, and attached Exhibits. One of these businesses, the Riverboat on the Potomac, actually straddles the boundary line and bears a sign a few feet from the entrance stating "Welcome to Maryland." Declaration of Rick Forrester, Exhibit N, ¶ 3. While Virginia has its own lottery and has placed lottery terminals on the Virginia side of the boundary at this facility, *id.*, ¶ 1; Declaration of Kenneth A. Schertle, Exhibit O, ¶ 9, it admits that it "has not issued licenses

to sell Virginia lottery tickets on property located below the low-water mark of the Potomac River." Exhibit CC-16, Response to Request for Admission No. 88. Maryland has also issued a license to one of these businesses to operate a Maryland off-track-betting operation. *See* Schertle Decl., Exhibit O. Virginia admits that it has not issued licenses to operate any Virginia off-track-betting operations at such businesses. Exhibit CC-16, Response to Request for Admission No. 95.

Rather than object to such exercises of Maryland's regulatory authority, Virginia governmental entities have appealed to Maryland to exercise that authority to Virginia's benefit. Since at least 1952, for example, the Charles and St. Mary's County Departments of Health have licensed and inspected food service facilities built on piers and wharves adjacent to Virginia's side of the river. *See* Declaration of Walter Raum, Exhibit S, ¶¶ 2, 3 (stating that such inspections at Coles Point Tavern date back to approximately 1952 and were a "coveted assignment"); Declaration of Walter Miles, Exhibit R; Declaration of Patricia Herriman, Exhibit P, ¶¶ 5-33 and Exhibits 1-122; Declaration of Ann Rose, Exhibit Q, ¶¶ 3-7 and Exhibits 1-24. In a letter dated August 12, 1993, the Rappahannock Area Health District of the Virginia Department of Health complained to the Charles County Department of Health that an onsite sewage disposal system located in Fairview Beach, Virginia was "not adequate to handle the sewage" that would be generated by a restaurant on the Fairview Beach Pier if the restaurant was to be open for business. "Since the restaurant is located in the jurisdiction of the Charles County Environmental Health Department, the Rappahannock Area Health District and King George County Health Department request that the restaurant not be allowed to open as long as it is connected to the onsite sewage disposal system." Exhibit 120 to Herriman Decl., Exhibit P. Virginia

agencies have also referred to Maryland other complaints about establishments regulated by Maryland. Herriman Decl. ¶¶ 25-29 and Herriman Exhibits 112-116.

e. Waterway construction activities.

Notwithstanding the claim it makes in its Complaint that the Commonwealth and its citizens have the unrestricted right to build piers and wharves from the Virginia side of the Potomac beyond the low water mark, Virginia has treated these waterway construction activities in precisely the same way it has addressed every other activity that takes place on Maryland's side of the boundary line. Virginia has not regulated this construction activity, and, in case after case, and project after project, it has referred applicants to Maryland and admitted Maryland's jurisdiction.

As was undoubtedly the case in 1785, the vast majority of waterway construction on the Potomac occurs in the tidal portion, below Washington, D.C. Owners of riparian property on both sides of the Potomac routinely seek to build wharves, docks, piers, or landings to allow for easier access to the navigable channels of the river, or bulkheads, groins, jetties, or breakwaters to protect their shoreline property against erosion. As was also the case in 1785, these activities are subject to government regulation. *See, e.g., Dutton v. Strong*, 66 U.S. at 32; *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 445-46; *Taylor v. Commonwealth*, 102 Va. at 773, 47 S.E. at 880.

In Virginia, the agency that "issues permits for all reasonable uses of state-owned bottomlands (submerged lands)" is the Virginia Marine Resources Commission ("VMRC"). *See* Virginia Response to Maryland Interrogatory No. 7, Exhibit CC-15. The VMRC "considers the effect of the proposed use on other reasonable and permissible uses of state waters and state-owned bottomlands, marine and fisheries resources of the Commonwealth,

tidal wetlands, adjacent or nearby properties, water quality and submerged aquatic vegetation." *Id.* The VMRC also regulates "all dredging, extraction or mining on state-owned bottomlands (submerged lands)." *Id.*, Response No. 8. Virginia has conceded, however, that, with respect to the submerged lands of the Potomac River, the Commonwealth follows the principle that regulatory power comes with ownership: "These [VMRC] permits are only issued for structures in the Potomac River which are within those embayments that are within the boundaries of Virginia; they are not issued for structures below the low-water mark of the Potomac River where that low-water mark is the boundary between Virginia and Maryland." Virginia's Response to Maryland Interrogatory No. 7, Exhibit CC-15. *See also* Va. Code Ann. § 28.2-1205 (stating that the VMRC has jurisdiction over all state-owned bottomlands).

In Maryland, the Maryland Department of the Environment ("MDE") regulates the dredging and filling of tidal waters and wetlands, including the placement of wharves, piers, and other structures therein. MD. CODE ANN., ENVIR. ART. § 16-202.[16] Maryland asserts jurisdiction under its Tidal Wetlands Act over all the lands beneath the high water mark within the State. In the Potomac, this means that Maryland's jurisdiction reaches all structures extending out beyond the low water mark established in the Black-Jenkins Award, as mapped by the Mathews-Nelson Survey. At all times since the enactment of the Tidal Wetlands Act, Maryland has actively regulated the placement of structures in the Potomac River beyond the low water mark on the Virginia side of the river. As reflected in Ex. BB-

[16] The Maryland tidal wetland regulatory program was transferred to MDE in July 1995. Prior to that time, the program was administered by the Maryland Department of Natural Resources.

349, Maryland has issued approximately between 250 and 350 authorizations for Virginia shoreline projects, including piers, decks, bulkheads, jetties, groins, and other exercises of the "privilege" encompassed under the Compact. It has issued authorizations to properties along the entire length of the Potomac on the Virginia side, to all varieties of applicants, public and private.

Conversely, as it has with respect to the other regulatory activities discussed earlier, Virginia has acknowledged on hundreds of occasions that Maryland has jurisdiction over construction activities taking place beyond low water mark on the Potomac. At first, in the 1970s, the VMRC acknowledged Maryland's jurisdiction by copying the Maryland Department of Natural Resources on letters to applicants informing them that, because their projects extend out beyond low water mark, they are not subject to the VMRC's jurisdiction. *See, e.g.*, Ayella Decl., Exhibit BB-17. Maryland would process the applications and determine what form of Maryland authorization, wetlands license or letter of no-objection, was appropriate. *Id.*, ¶¶ 3-10, 21.

Beginning in the 1980s, Virginia's acknowledgment of Maryland's jurisdiction became more explicit, stating, for example, in an April 6, 1982, letter to an individual who had objected to the timber groin project proposal of his neighbor, that the VMRC "would not have jurisdiction" over the project because it extended beyond the low water mark of the Potomac and that the VMRC only "has jurisdiction over all State-owned subaqueous land, channelward of the mean low water, not conveyed by special grant or compact according to law. . . . I am forwarding a copy of your letter to the U.S. Army Corps of Engineers, Baltimore Maryland District, and the Maryland Department of Natural Resources. Both of these agencies would have jurisdiction over this project." Ex. BB-346, at VA-MRC-F-

00274. Virginia continued to acknowledge Maryland's jurisdiction, and to refer applicants to the Maryland Department of Natural Resources for authorization, based on the VMRC's understanding of the boundary line as the justification for both Maryland's jurisdiction beyond low water mark and the VMRC's lack of authority over Virginia applicants who proposed building past that boundary line.[17] Indeed, in one effort to help an applicant "in understanding the agencies with jurisdiction along the shoreline of the Potomac River at Colonial Beach," the VMRC in a letter dated April 4, 1984 stated that "[i]n 1785, Maryland and Virginia signed a compact in which Maryland took jurisdiction over the subaqueous lands of the Potomac River to the mean low water mark of the Virginia shore. As a consequence, projects constructed channelward of mean low water in the Potomac River fall under the jurisdiction of the Maryland Department of Natural Resources, rather than the Virginia Marine Resources Commission." Ex. BB-346 at VA-MRC-F-00354. A more direct admission and understanding about the jurisdictional nature of the boundary line between the two States would be hard to imagine.

The Maryland Board of Public Works in 1987 adopted a "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal

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[17] *See, e.g.*, Ex. BB-21, VA-MRC-F-00186 (November 9, 1983, VMRC letter to the King George County Wetlands Board clarifying "some misunderstanding of our relative jurisdictions" on the Potomac by stating "[u]nder the revised Wetlands Law (and your new [County wetlands] ordinance) you now have jurisdiction over the inter-tidal area of your entire shoreline. Our (VMRC) jurisdiction, on the other hand, begins at mean low water and extends channelward to the limit of State ownership of the bottom (generally the 3 mile territorial sea). However, since Maryland owns the entire Potomac River from mean low water channelward we are unable to exercise jurisdiction over projects which encroach into the Potomac. We only have jurisdiction in the tributaries along the Virginia shore. . . ."). *See also, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 39-43.

Portion of the Potomac River" ("1987 Policy"). Ex. AA-11.[18] The 1987 Policy set forth the types of projects for which Maryland would require a wetlands license from the Board. Such a license was not required for piers, bulkheads, and other projects involving near-shore impacts. *See* Moore Decl., Exhibit AA, ¶ 20. These projects would typically be authorized under a "No License" letter, by which Maryland would notify the Virginia applicant that the project, while subject to Maryland's jurisdiction, did not require a Maryland license. *See id.*, ¶ 21; Ayella Decl., Exhibit BB, ¶¶ 9, 10; *see also* Ex.BB-33 at VA-MRC-00048.[19]

Notwithstanding its streamlined review of these kinds of projects, the 1987 Policy unequivocally asserts Maryland's jurisdiction over Virginia projects extending beyond the low water mark on the Virginia shoreline. *See* Ex. AA-11 at MD-BPW-000400 ("Along the Virginia shore, Maryland waters generally commence at the low water mark or exist along a line from headlands and continue offshore therefrom and therefore dredging, filling, breakwaters, jetties, and groin projects affect Maryland waters and are subject to the requirements of Maryland law.") (endnote omitted). The Policy was adopted only after it had been shared with representatives of the Virginia counties along the Potomac, the VMRC, and the VMRC's counsel, Frederick Fisher, who offered no changes. *See* Moore Decl., Exhibit

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[18] The 1987 Policy was later codified as COMAR 23.02.04.21. Moore Decl., Exhibit AA, ¶ 23.

[19] Virginia has recognized that these "No License" or "No Objection" letters, while not an actual license, are nevertheless authorizations and, as such, exercises of Maryland's regulatory jurisdiction. *See, e.g.*, Exhibit BB-83 at VA-MRC-01291 (June 20, 1992 letter from Jay M. Woodward, VMRC, to B.M. Marshall, Virginia Power, stating his understanding that Virginia Power, which had been issued Maryland "No Objection" letter No. 92-NO-1892, had "received authorization from the Maryland Department of Natural Resources, as they have jurisdiction over waters of the Potomac River below the mean low water line").

AA, ¶¶ 9-22. After Maryland's adoption of the 1987 Policy, Virginia continued to refer Virginia applicants to Maryland for piers, jetties, bulkheads and every other variety of riparian improvement. *See* Ayella Decl., Exhibit BB, ¶¶ 25-30.

In 1994, the Maryland Board of Public Works promulgated the 1987 Policy as a regulation. COMAR 23.02.04.21. The 1994 regulation continued the policy of not requiring a formal license for Virginia shoreline improvements that meet certain criteria for width, length, and coverage. *See, e.g.*, Exhibit BB-139 at VA-MRC-01026. As in the past, Virginia continued to acknowledge Maryland's jurisdiction and has continued to refer its citizens and political subdivisions to Maryland, even after the Commonwealth filed its Motion for Leave to File Bill of Complaint in this case. Ayella Decl., Exhibit BB, ¶ 29. This practice has continued more than a year after the Supreme Court agreed to review the case in May, 2000, *id.*, ¶ 30, and confirms both States' understanding – consistently followed since the Black-Jenkins Award in 1877 – that the boundary is the line of sovereignty, that Maryland's regulatory jurisdiction over the construction of wharves, piers, and other riparian shoreline improvements begins at the low water mark on the Potomac,[20] and that, if the riparian improvement crosses the boundary line, the portion lying beyond the line is within Maryland's jurisdiction, and not Virginia's.[21]

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[20] *See, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 39-43; *see also, e.g.*, Ex. BB-346 at VA-MRC-02757 (March 6, 2000, VMRC letter stating: "the mean low water and mean high water line should be depicted, as this is needed to help determine jurisdictional areas between Virginia and Maryland").

[21] *See, e.g.*, Ex.BB-233 at VA-MRC-02415 (December 11, 1998, VMRC letter noting that "[a]lthough the proposed pier originates in Prince William County, Virginia, it does extend into Charles County, Maryland. Following telephone conversations with the U.S. Army Corps of Engineers in Baltimore and the Maryland Department of the Environment, I was (continued...)

The same understanding has extended to construction activity taking place in the non-tidal portion of the Potomac River. Maryland began comprehensive regulation of all construction activities that changed the "course, current, or cross-section" of the non-tidal Potomac in 1933, when the legislature enacted the first comprehensive water resources law in Maryland. 1933 Md. Laws Ch. 526 ("Water Resources Law").[22] Maryland issued a number of permits in the 1960s for pipelines, cables, and other utility crossings of the Potomac River. Maryland issued the first waterway construction permit for work occurring solely on the Virginia side of the non-tidal Potomac in 1968, when the Town of Leesburg sought to construct a drinking water intake extending beyond the low water mark, Ex. Y-1, and has issued dozens of permits for construction on the Virginia side to Virginia applicants for both large and small projects ever since. *See* Sigillito Decl., Exhibit Y, ¶¶ 3-20.

There is no evidence that, prior to the Authority's 1996 application for its second mid-river intake, any of the Virginia applicants ever submitted their applications under protest or otherwise claimed that Maryland did not have jurisdiction over the project. *Id.*, ¶ 22. Nor did the Virginia entities that participated in the Maryland permit process for these projects claim that Virginia alone could regulate the projects at issue or that Maryland did not have jurisdiction over such activity. On the contrary, Virginia has agreed, as it has with respect

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[21] (...continued)
advised to forward a copy of the attached permit application directly to Ms. Andi Cunabaugh at the Maryland Department of the Environment for their review").

[22] Although the 1933 Water Resources Law established the first comprehensive regulatory program for waterway construction, Maryland prior to 1933 nevertheless regulated dams and bridges under earlier legislation. *See, e.g.*, 1853 Md. Laws Ch. 179 (assenting to the United States' construction of a dam across the Potomac to supply the District of Columbia with water); 1876 Md. Laws Ch. 242, § 21 (requiring the approval of the Maryland Board of Public Works for all railway bridges across the navigable waters of the State).

to the tidal Potomac, that Maryland has regulatory jurisdiction over construction extending beyond the low water mark on the non-tidal Potomac. For example, in 1979, the Virginia State Water Control Board ("SWCB") referred the Northern Virginia Regional Park Authority – itself a political subdivision of the Commonwealth – to Maryland for review of the Park Authority's proposed boat ramp. The SWCB stated that "[w]hile the work you have described will take place on the Virginia shoreline, any work done in the waterway will take place in the Potomac River and will be under the jurisdiction of the State of Maryland." Exhibit CC-27, VA-MRC-F-00756. The Park Authority subsequently applied for and obtained a Maryland waterway construction permit. Sigillito Decl., Exhibit Y, ¶ 10.

In fact, the Virginia Department of Health and the VMRC have both stated unequivocally that the Fairfax County Water Authority's mid-river intake – the very waterway construction that gave rise to this case – was beyond Virginia's jurisdiction because it extended into Maryland territory. The Department of Health, writing to the Authority on January 24, 1994, stated that:

> We have received your letter and sketches on the proposed mid-river intake and have no objections to this proposal. While no further formal permitting requirements are necessary for this type of project since the modifications or new construction will be located in Maryland, we request the opportunity to see the final plans and design information prior to the start of any construction.

Ex. CC-32. Two years later, the VMRC put a finer point on it:

> You have inquired regarding a permit to construct a 120,000 square foot concrete intake structure to withdraw water from a nontidal portion of the Potomac River upstream of Seneca Dam in Loudoun County, Virginia, and Montgomery County, Maryland.
>
> Please be advised that your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.

> Your project will, however, encroach on subaqueous bottom under the jurisdiction of the State of Maryland. They have been forwarded a copy of your application and the archeological investigations report and will contact you if further authorization is required.

Ex. CC-33 (emphasis added).

Virginia's repeated admissions that Maryland, and not Virginia, has jurisdiction over construction occurring in the Potomac River beyond the low water mark on the Virginia side simply cannot be squared with the claims it now makes in this case.

f. Water appropriation activities.

The regulation of water withdrawals from the Potomac is another context in which both States have recognized that the boundary line established by the Black-Jenkins Award represents the point at which Virginia's territorial sovereign jurisdiction terminates and Maryland's starts. Subject to a brief time period discussed below, both States have understood that it has been Maryland, and not Virginia, that has regulated the withdrawal of water from the Potomac since the Black-Jenkins Award of 1877. Indeed, Virginia concedes that, to this day, it has never implemented an administrative system for regulating the withdrawal of water from the Potomac River. *See* Exhibit CC-15, Virginia Interrogatory Responses 4 and 5. By contrast, Maryland has regulated water withdrawals from the Potomac since 1933, when it established the first and only formalized water appropriation permitting system in use on the Potomac River.

Ironically, while Virginia now claims the right to withdraw water from the Potomac River without submitting to Maryland's authority, a political subdivision of the Commonwealth, Fairfax County, was among the first to apply for, and obtain, a Maryland permit to engage in that activity. Fairfax County submitted its application on October 10, 1956, without protesting Maryland's authority to require a permit or otherwise contesting

Maryland's jurisdiction. Pajerowski Decl., Exhibit X, ¶ 8. The Maryland Department of Geology, Mines and Water Resources issued the permit on February 25, 1957, and it was accepted by Fairfax County on March 22, 1957. *Id.*, ¶ 9.[23] Thus, while the regulation of water withdrawals was a fairly new phenomenon in the 20th century, Fairfax County's submission to Maryland's regulatory authority in this area was another example of how widely all parties understood that the boundary line represented the line of sovereignty for all purposes.

That understanding has continued through the present. Virginia entities have on at least 29 occasions applied for and obtained Maryland permits to withdraw water from the Potomac. *Id.*, ¶¶ 9, 16, 17, 18, 20-44. As with Fairfax County four decades earlier, not one of these Virginia applicants contested or in any way objected to Maryland's jurisdiction. *Id.*, ¶ 45. On the contrary, throughout the forty-plus years since Fairfax County first applied in 1956, Virginia and its political subdivisions actively participated in the Maryland permit process by submitting comments on proposed applications and stating their position.[24]

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[23] The Water Resources Commission administered the water appropriation permitting system from its inception in 1933 to 1941, when its responsibilities were transferred to the newly created Department of Geology, Mines and Water Resources. In 1964, the water appropriation program was transferred to the newly created Department of Water Resources, which administered the program until 1969. In 1969, the Department of Water Resources was incorporated into the Department of Natural Resources as the Water Resources Administration, which continued to administer the water appropriation program until 1995, when responsibility for the program was transferred to MDE, which incorporated the Water Resources Administration as the Water Management Administration.

[24] For the most part, Virginians supported Virginia applications. *See, e.g.*, Pajerowski Decl., Exhibit X, ¶¶ 58-61. Sometimes, however, the support was conditional. *See, e.g., id.*, ¶¶ 55-57 (Towns of Leesburg and Herndon support FCWA's 1974 application only on condition that withdrawal will not impede Towns' water use). In some cases, Virginia commenters urged Maryland to use its regulatory power to solve water use and development conflicts

(continued...)

Moreover, all of this occurred with the knowledge of the Virginia Governor and the SWCB. The Office of the Virginia Governor reviewed the Town of Leesburg's application for financial assistance for its Potomac River Water Supply Project and supported the "essential project," Ex. X-50 at MD-MDE-13085-10, noting in another letter that "[n]o conflict was found to exist at the State." Ex. X-49 at MD-MDE-13085-08.[25] The SWCB also received notification of permit applications as a matter of routine, *see, e.g.*, Ex. X-47, and took part in many of the more significant permit actions.[26] Indeed, the SWCB played an active role in the Fairfax County Water Authority's 1974 application, and did so in a manner that reinforced the validity of Maryland's regulatory authority. After noting the allocation crisis in the Potomac and expressing hope that "under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource," Exhibit X-54 at MD-MDE-13122-27, the SWCB advised Maryland that "we support Fairfax County Water Authority's application for a withdrawal permit, and request that you act favorably on its application." *Id.* at MD-MDE-13122-28. At one point, a member of the Board, R.V. Davis,

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[24] (...continued)
within the Virginia interior. *See, e.g., id.*, ¶ 47 (Loudoun County Sanitation Authority urging Maryland not to grant the 1968 Leesburg permit on the grounds that Leesburg would supply water to customers outside of the town limits, thereby taking customers from the LCSA and eroding the customer base over which the Authority could spread the cost of "the orderly development of a county-wide water and sewerage sytem").

[25] There is even evidence suggesting that Virginia Governor Mills Godwin contacted Maryland Governor Spiro Agnew concerning the status of the Leesburg permit process in 1968. Pajerowski Decl., Exhibit X, ¶ 51.

[26] For example, the SWCB weighed in on Leesburg's application, addressing concerns raised by Prince George's County, Maryland, concerning the Town's wastewater discharges on the Potomac. Ex. X-47 at MD-MDE-13089-01; *see also, e.g.*, Ex. X-54.

even contacted Herbert Sachs, Director of the Water Resources Administration, requesting that the Authority's permit be issued to the Commonwealth itself, instead of the Authority. Exhibit CC-17, Deposition of Herbert M. Sachs, at 110-111.

It was not until 1976 and the negotiations that led to the Low Flow Allocation Agreement of 1978 ("LFAA") that the Commonwealth, through the SWCB, first raised any concerns whatsoever to the application of Maryland's permit process to Virginians. Virginia's concerns initially arose out of the introduction of H.R. 12215, which mandated the negotiation of a low flow allocation agreement as a condition of federal approval of WSSC's long-delayed weir but did not include Virginia as a party to the negotiations. *See* Ex. CC-22 at VA-SRC-002654-55. Later, the Commonwealth objected to the Corps's insistence that the allocation of low flows be based on existing levels of withdrawals, because no Virginia entity had actually begun withdrawing water, with the result that Virginia would effectively be shut off from the river during low flows. Ex. CC-24. Maryland and Virginia eventually came to terms on Virginia's participation in the agreement, Exhibit CC-23, but in the course of their negotiations, Virginia noted "for the record" that it "has not recognized the Maryland permit and appropriation authority" over the Potomac. Exhibit CC-21. Maryland, for its part, continued to assert that its permitting authority extended to the use of the Potomac by any person or entity, from either side of the river. Exhibits CC-20 at VA-SRC-002724; CC-26.

The LFAA that both States subsequently signed specifically recognized the Maryland permitting system by including a clause stating that "the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the State's Department of Natural Resources

(hereinafter called 'the Administration') to appropriate and use the water of the Potomac River" (App. 79a),[27] and stating further in Article 3.C that "[n]othing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River . . . ." *Id.* Indeed, Article 3.E of the LFAA puts all new users – Virginians and Marylanders alike – to a choice: achieve compliance with the low flow provisions either by becoming signatories to the agreement or by obtaining an appropriation permit that contains the agreement's low flow provisions. (App. 94a.) For the four new Virginia users withdrawing water from the portion of the Potomac governed by the LFAA[28] – the Northern Virginia Regional Park Authority, P.D. Gravett, the Williams Gas Pipeline Corp., and the Bondy Way Development Corp. – it is their Maryland permit that alone achieves compliance with the LFAA. Pajerowski Decl., Exhibit X, ¶ 75.

As with other exercises of Maryland regulatory authority over the Potomac, Virginia and its citizens have benefitted from the manner in which Maryland has regulated water withdrawals. Indeed, it is only through the Maryland permitting system that the Fairfax County Water Authority and other Virginia municipal users can legally withdraw Potomac River water for use on non-riparian land. As discussed previously, Virginia law does not

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[27] Such "non-exempt jurisdictions" included several Virginia entities that had already applied for and obtained water appropriation permits under the Maryland law – the Fairfax County Water Authority, Leesburg, and the Northern Virginia Regional Park Authority. Pajerowski Decl., Exhibit X, ¶¶ 18, 20, 22.

[28] Article I.A.1 of the LFAA defines that portion as the part of the River between Little Falls and "the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland." (App. 82a.)

permit a municipality to divert water in such a manner. *See Town of Purceville v. Potts* 179 Va. at 521, 19 S.E.2d at 703. Under the Virginia system of water law, the Fairfax County Water Authority could not legally provide water for municipal use throughout its service area because its service area is not itself riparian to the Potomac. *See* Ex. X-53 at MD-MDE-13122-30 (Authority official J. Corbalis stating at Maryland public hearing that the Authority's options were limited by "the Virginia law which forbids diversions of water from one stream to another").

Maryland, by contrast, employs the "reasonable use" variation of riparian water law, under which any use is allowed provided that it is reasonable. COMAR 26.17.06.02B. A variety of factors determine reasonableness, including the impact of the use on other users and on the aquatic environment, COMAR 26.17.06.05A(2), B, but the non-riparian use of the water is not prohibited, as it is in Virginia. As a result, the Town of Leesburg and the Fairfax County Water Authority have been able, as have the WSSC and the City of Rockville, to use Maryland law to provide water without regard to the parcels on which it is to be used.

Virginia has thus recognized and received the advantages of the Maryland permit program, and has chosen to agree to Maryland's "continued operation of the permit system in the interest of the riparian owners on both sides of the River." Ex. CC-25. Manifesting their understanding that Maryland has unqualified jurisdiction over the Potomac even after the initiation of this litigation, Virginia political subdivisions have continued to acknowledge that Maryland has jurisdiction over the withdrawal of water from the river, including Fairfax County, which represents to the public, as it did almost twenty years ago, that "[t]he State of Maryland has jurisdiction over the withdrawal, appropriation and use of water from the

Potomac River and regulates all users, including the Authority." Ex. CC-37. *See also* Ex. X-58 at MD-MDE-13122-11 (September 1973 statement of Fairfax County Water Authority that the "[Maryland Water Resources] Administration has the authority to make allocations of Potomac River water among the users"); Ex. X-56 at MD-MDE-13132-16 (July 16, 1973 resolution passed by Fairfax County Board of Supervisors noting the Authority's application to "the State of Maryland which has jurisdiction over the upper Potomac").

These statements and actions are consistent with numerous others that have preceded them. Indeed, at the same time Maryland asserted its authority over Fairfax County's request to withdraw water from the river in 1956, Virginia conceded in the 1958 Compact that "Maryland is the owner of the Potomac River bed *and waters* to the low water mark of the southern shore thereof" (App. 60a) (emphasis added), and the 1958 commissioners concluded that Virginia's access rights under Article VII of the Compact of 1785 "have not been in controversy." (App. 58a.) Virginia's newly made assertion in its complaint in this case that "Maryland does not own the water in the River," Complaint ¶ 46, is simply belied by a well-documented history in which Virginia, its political subdivisions, and its citizens repeatedly manifested a completely contrary understanding concerning Maryland's jurisdiction over the Potomac.

In sum, since the Black-Jenkins Award drew the boundary line at the low-water mark on Virginia's side of the Potomac, both Maryland and Virginia have recognized that boundary line as the line of sovereignty in all respects. Maryland has exercised authority over property and activities located on wharves and piers extending from the Virginia side of the Potomac onto Maryland's side of the boundary line, by subjecting that property and those activities to permitting, taxing, licensing, policing, public safety, health, gambling, and

other regulatory actions. In contrast, Virginia has not engaged in such regulation, has not objected to Maryland's regulation and, in many instances, has recognized, participated in, and aided Maryland's regulation. Virginia's belated and *post hoc* interpretation of the Black-Jenkins Award should be rejected because the "longstanding assumption of jurisdiction" described above "not only demonstrates the parties' understanding . . . but has created justifiable expectations which should not be upset . . . ." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977).

II. VIRGINIA HAS ACQUIESCED IN MARYLAND'S ASSERTION OF AUTHORITY OVER THE POTOMAC.

Maryland's authority over the Potomac River is supported by the additional and independent reason that Maryland has long exercised regulatory authority over the river without any objection from Virginia. "The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926). Accordingly, even if the Compact and the Black-Jenkins Award had given Virginia citizens access rights to the Potomac without the need to submit to Maryland's regulatory authority, "[i]ndependently of any effect due to the compact as such, a boundary line between the states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant." *Virginia v. Tennessee*, 148 U.S. at 522. *See also California v. Nevada*, 447 U.S. 125, 131-32 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 649-52 (1973); *Vermont v. New Hampshire*, 289 U.S. at

613-20; *Michigan v. Wisconsin*, 270 U.S. at 306-08, 316-19; *Maryland v. West Virginia*, 217 U.S. at 40-46. Maryland and Virginia's longstanding treatment of the Black-Jenkins boundary as the line of sovereignty for all purposes is conclusive and bars Virginia's claims in this case.

While the Court has applied these principles in a number of cases, it has almost always done so for the purpose of establishing the boundary line between the States that are parties in those cases. *See, e.g., Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) ("Although Kentucky has styled its acquiescence claim an affirmative defense, this 'defense,' if successfully proved, would not only counter Illinois' boundary claim but also establish Kentucky's own position."); *Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) ("Georgia's argument is essentially this: long acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes."); *Arkansas v. Tennessee*, 310 U.S. 563, 569 (1940) ("The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained."); *Maryland v. West Virginia*, 217 U.S. 1, 42-43 (1910) ("[T]here is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.") (quoting *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846)). As between Maryland and Virginia, the boundary was resolved more than 120 years ago and is not an issue in this case.

The Court has also applied the doctrine of prescription and acquiescence in resolving rival claims of sovereign authority over land, *see New Jersey v. New York*, 523 U.S. 767, 786-806 (1998), and the preceding discussion demonstrates that Virginia for more than a

century has treated the boundary between the States as an absolute line of sovereignty that has not been subject to any of the exceptions the Commonwealth now asks the Court to declare. Indeed, even after Virginia filed this suit asserting the right to build piers, wharves, and water intake pipes in the Potomac without submitting to Maryland's regulatory authority, its agencies and officials have continued to recognize that Virginia has no jurisdiction over construction activity that extends from the Virginia side of the river past the low-water mark. *See* Ayella Decl., Exhibit BB, ¶¶ 29-30. Virginia has informed its citizens in these circumstances, not that they must seek permission from Maryland to engage in this activity because they will risk criminal or civil sanctions if they do not, but rather that "since your proposed project will extend channelward of the mean low-water mark, you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland." Exhibit BB-269 at VA-MRC-02640 August 1, 2001 letter).[29]

Virginia's discovery responses confirm that the Commonwealth long ago acquiesced in Maryland's broad assertion of sovereignty over the Potomac and specific regulation of Virginians' access to the river. In response to Maryland's Request for Admission No. 16 that "[p]rior to the events that led to the filing of this lawsuit, Virginia has recognized that Maryland may properly exercise regulatory authority over activities occurring below the low-water mark of the Potomac River, including activities of Virginia citizens, residents and

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[29] Nor is the Commonwealth alone in its understanding that Maryland's jurisdiction over shoreline improvements begins at low water mark on the Potomac. The same understanding is shared by Virginia's counties, *see, e.g.*, Ex. CC-30 (King George County), and its towns, *see, e.g.*, Ex. CC-35 (Town of Colonial Beach), as well as the Corps. *See* Exs. CC-31, CC-34 (1993 and 1998 federal Regional Permits issued pursuant to 33 U.S.C. § 1344(e) stating that "[t]hose activities on the Potomac River extending beyond the mean low water line may need authorization by the Maryland Department of Natural Resources").

entities," the Commonwealth stated "Virginia admits that it does not dispute Maryland's authority to exercise certain police powers in the Potomac River on its own side of the Virginia/Maryland line, provided that the exercise of such powers does not interfere with Virginia's federal common law or interstate compact rights." Exhibit CC-16.[30] While Virginia denies "it has recognized that Maryland may require that Virginians obtain water appropriation or waterway construction permits as a condition of withdrawing water from the Potomac River, or building improvements appurtenant to the Virginia shore of the Potomac River," *id.*, Virginia long ago acquiesced in Maryland's authority to regulate the Commonwealth's purported "federal common law or interstate compact rights," including any rights Virginia claims to have to pursue waterway construction or appropriation activities in the Potomac.

Although the Commonwealth in one instance argued before the Court of Appeals of Maryland one hundred and forty years ago that the "privilege" set forth in the Compact to build wharves and other improvements "surrendered in favor of Virginia her power to tax the property within her chartered limits on that shore, and all improvements projected therefrom," *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1, 9 (1861), Virginia never renewed that argument after it accepted the Black-Jenkins Award, even though since that time Maryland officials have engaged in a number of taxation and

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[30] *See also id.*, Virginia's Response to Requests for Admission Nos. 17 (same admission in response to request for admission that "[s]ince at least 1878 and prior to the events that led to the filing of this lawsuit, Virginia has recognized that Maryland may properly exercise regulatory authority over activities occurring below the low-water mark of the Potomac River""); 18 (same admission in response to request for admission that "[s]ince at least 1934 and prior to the events that led to the filing of this lawsuit, Virginia has recognized . . ."); 19 (same admission in response to request for admission that "[s]ince at least 1958 and prior to the events that led to the filing of this lawsuit, Virginia has recognized . . .").

other regulatory activities with respect to property built from the Virginia side of the river, and, as discussed earlier, the documentation for those activities dates back at least fifty years. Indeed, rather than contend anew that Virginia has power and authority over improvements projecting from its side of the Potomac River, Virginia's Attorney General a century later acknowledged the opposite in responding to an inquiry concerning the Commonwealth's jurisdiction over the use of alcohol at a restaurant built on a pier attached to Virginia, stating that even though "[t]he rights of a riparian owner . . . include the '. . . right to build a pier or wharf out to navigable water, subject to any regulations of the State,'" the "lawful exercise" of such a right "would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (quoting *Thurston v. Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965)) (Exhibit CC-13). At the same time, Maryland's Attorney General expressed the view that the Compact of 1785 "does not in any way detract from Maryland's right to levy taxes against improvements located in the River beyond the low watermark," even "when those improvements were made to shore properties on the Virginia side of the river." February 3, 1956 Md. Att'y Gen. Op. 335, 336 (Exhibit CC-6).

Maryland has accordingly long "infringed" Virginia's newly alleged federal common law or interstate compact rights, without any objection from the Commonwealth, *see* Exhibit CC-14, ¶¶ 9, 11, 12, 14, by regulating what Virginia's Attorney General long ago claimed is "Virginia property, or property attached to the Virginia shore" that, according to his interpretation of the Compact, is "exempt" from the "power of Maryland." *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. at 9. Maryland's exercise of that power is a fundamental aspect of its sovereignty over this property and, as stated in *New Jersey v. New York*, 523 U.S. at 792, "the kind of evidence of prescription that we have found

particularly persuasive . . . ." *See also Georgia v. South Carolina*, 497 U.S. at 392-93 (citing as evidence of South Carolina's "sovereignty by prescription and acquiescence" "[t]he South Carolina grant in 1813, the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina authorities, patrolling by South Carolina wildlife officers, and other factors"); *Arkansas v. Tennessee*, 310 U.S. at 567-68 (discussing similar evidence); *Louisiana v. Mississippi*, 202 U.S. 1, 54-55 (1906) (same).

This evidence of Virginia's acquiescence is insurmountable when considered with the repeated exercises of Maryland regulatory authority that, as discussed above, Virginia has not challenged and, indeed, has readily accepted at the same time it acknowledged it did not have such authority. If Virginia truly believed that its citizens had a common law or interstate compact right to build a wharf or other improvement beyond the low-water mark without submitting to Maryland's regulatory authority, then the Commonwealth would not have spent at least the last 34 years informing its citizens that it has no jurisdiction over that activity, that the activity does not change the boundary line between the States, and that the activity will encroach upon the Potomac River bottom under the State of Maryland's jurisdiction. Similarly, the Commonwealth would not have conceded, as it has since at least the 1940s, that its criminal laws do not extend to that portion of a Virginia-based pier or wharf beyond the low-water mark, but that Maryland's do. Nor would Virginia have failed to enforce, since at least 1900, a number of its other laws with respect to piers, wharves, and other structures extending from the Virginia side of the Potomac beyond the low-water mark, *see* Exhibit CC-14, ¶¶ 6-8, 10, 11, that Maryland authorities, in contrast, have comprehensively regulated. The Commonwealth's sudden attempt to reverse course,

following its "long continued failure . . .to assert any dominion over the . . . river" and its "long acquiescence in the dominion asserted there by" Maryland, *Vermont v. New Hampshire*, 289 U.S. at 613, "is of substantial weight in indicating acquiescence . . . in the boundary line restricting her jurisdiction to the river at the low-water mark." *Id.* at 616.

A State's failure to assert authority in circumstances like these is significant. *See also Indiana v. Kentucky*, 136 U.S. 479, 510 (1890) ("Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof."). The Court has also declared, in determining whether one State has acquiesced in another's exercise of such authority, "we are concerned not only with what its officers have done, but with what they have said, as well." *Illinois v. Kentucky*, 500 U.S. at 386. As set forth above, the Attorney General and other officials of the Commonwealth have stated on several hundred different occasions, in a variety of contexts, that Virginia's jurisdiction over the Potomac ends at the low-water mark, that the Commonwealth does not have authority beyond that point over activities or piers and wharves, that the exercise of the right to construct such improvements does not change the boundary line between the two States, and that Maryland has jurisdiction over the river because Maryland owns the Potomac. In reliance on these statements, Virginia's citizens and political subdivisions have turned to Maryland seeking permission to erect piers, wharves, jetties, and other structures from the Virginia side beyond the low-water mark into Maryland, they have asked Maryland to allow them to withdraw water from the river, and the Governor of Virginia requested his Maryland counterpart to sponsor legislation outlawing activity taking place on piers and wharves that the highest law

enforcement official in the Commonwealth stated was beyond Virginia's reach. This evidence underscores Maryland's sovereignty over the activities that Virginia now claims it may engage in without seeking Maryland's permission.

This evidence is also relevant not simply to show "the conduct of the states," but also to cast light on "the belief of the people concerning the purpose of the boundary line . . . ." *Maryland v. West Virginia*, 217 U.S. at 44. As the Court has recognized, "the belief of the inhabitants of disputed territory . . . is 'of no inconsiderable importance.'" *New Jersey v. New York*, 523 U.S. at 798 (quoting *Handly's Lessee v. Anthony*, 5 Wheat. 374, 384 (1820)). As discussed above, for years Virginians have applied to Maryland for permission to build piers and other structures beyond the low-water mark, filed with Maryland courts and agencies deeds and other documents relating to property extending from the Virginia side of the river into Maryland, paid taxes on improvements built on structures extending into Maryland, requested law enforcement assistance from Maryland officials with respect to activities taking place on such structures on Maryland's side of the boundary, and complied with a broad array of licensing requirements in areas as diverse as alcohol consumption to gambling activities to restaurant health inspections to water withdrawals. These facts, at a minimum, have "some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark," *Vermont v. New Hampshire*, 289 U.S. at 615, in a consistent and uniform manner, and did not believe that piers, wharves, or water intake structures attached to the Virginia side of the Potomac were exempt from Maryland's regulatory authority. *See also Arkansas v. Tennessee*, 310 U.S. at 567-68; *Michigan v. Wisconsin*, 270 U.S. at 306-07; *Maryland v. West Virginia*, 217 U.S. at 40-41, 44; *Virginia v. Tennessee*, 148 U.S. at 515-16, 527.

While "no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription," *New Jersey v. New York*, 523 U.S. 789 (quoting 1 L. Oppenheim, International Law § 242 at 456-57 (H. Lauterpacht 5th ed.1937)), the Court stated, in addressing the conduct of the United States and the Delaware Indians who each claimed up to a boundary line established by a survey, that "[i]n the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case. . . ." *United States v. Stone*, 69 U.S. 525, 537 (1865) (quoted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 605 n.28). Indeed, the arbitrators who established the boundary between Maryland and Virginia stated that "[t]he length of time which creates a right by prescription in a private party raises a presumption in favor of a State, that is to say, twenty years." (App. 28a). Regardless of the period of time required, Maryland's longstanding assertion of authority over the Potomac in all respects, coupled with Virginia's acquiescence in and recognition of that authority, demonstrate Maryland's right to regulate the activity at issue in this case.

For these reasons, judgment should be entered in favor of Maryland and against Virginia because Maryland has acted properly in regulating the Potomac as it has for the past two centuries.

CONCLUSION

For the reasons stated, Maryland's motion for summary judgment should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,	*	No. 129, Original
Plaintiff,	*	Before Special Master
v.	*	Ralph I. Lancaster, Jr.
STATE OF MARYLAND,	*	
Defendant.	*	

* * * * * * * * * * *

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In claiming that it has unrestricted access to the Potomac River, Virginia has failed to dispute any of the evidence that Maryland has produced demonstrating Maryland's entitlement to the entry of summary judgment in its favor. While Virginia argues that the Compact gives it the unrestricted right to build wharves and other improvements in the Potomac, nowhere in its 170-page brief does the Commonwealth make any reference to the undisputed fact that, at the time it entered into the Compact with Maryland, Virginia had already explicitly and unambiguously relinquished in its original Constitution any and all rights of "property, jurisdiction, and government" in or over the Potomac, save for a very limited claim to the shores or strands bordering the river. Such a sweeping surrender of sovereignty necessarily informs and defines the "plain language" that Virginia contends gives it an absolute right of access to the Potomac, and yet the Commonwealth does not even mention it. Virginia's attempt to bury this omission by arguing that the boundary was in dispute is based exclusively on statements that were made in entirely different contexts more than a hundred years after the Compact was written, and is no substitute for the need, in light of both States' undisputed understanding of Maryland's claim to the river at the time the Compact was formed, for clear and unequivocal language that either stripped Maryland of, or vested Virginia with, governmental authority over access to the Potomac. Virginia's claim fails because that language simply does not exist in the Compact.

Like its failure to even so much as acknowledge its own Constitution's recognition of Maryland's authority over the Potomac, Virginia also offers no evidence that refutes the undisputed understanding of both States, as consistently demonstrated since the time of the Black-Jenkins Award and manifested by the hundreds of exhibits that Maryland has produced, that the boundary line described there was and continues to be an absolute line of

sovereignty for all purposes. It is undisputed that, since the beginning of the 1900s, Virginia's Attorneys General, Governors, and other government officials have expressed unequivocally that Virginia has no jurisdiction of any kind beyond low-water mark, either on a wharf or other improvement built from the Virginia side, or otherwise. It is also undisputed, indeed, Virginia has stipulated, that it does not exercise its authority beyond that point *and* that it has not objected to Maryland's multiple exercises of its authority over any and all property and activity beyond low-water mark, whether that authority is in the form of taxes, criminal jurisdiction, occupational safety and health laws, liquor regulations, gambling statutes, or any of the other laws and ordinances that Maryland has enforced on the Potomac.

Virginia's actions speak louder than its words, and even its words, as set forth in its brief, neither question nor dispute three unshakable truths: Maryland has had title to the Potomac River since 1632 and has been its undisputed owner since 1877; Maryland has proven its ownership by exercising every possible police power with respect to any and all property and activities in the river on the Maryland side of the boundary line; and Virginia has never taken a single action that has in any way interfered with Maryland's exercise of sovereignty over the Potomac. These truths are borne out by a highly developed and uncontroverted factual record and point overwhelmingly to the conclusion that the river belongs to Maryland and is subject to Maryland's regulatory authority.

As the Special Master noted previously, "[s]ummary judgment is appropriate when the pleadings and other materials show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mem. of Dec. No. 4 at 5. The exhibits that Maryland has filed in support of its summary judgment motion "demonstrate

the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and Virginia has neither disputed the authenticity of that evidence nor offered "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (quotations and citation omitted). Judgment should accordingly be entered in favor of Maryland and against Virginia because Maryland's proof shows that Maryland's ownership of the Potomac includes the sovereign right to regulate any activity, including waterway construction and water withdrawals, occurring in the river beyond the low-water mark.

REPLY ARGUMENT

I. MARYLAND HAS THE RIGHT TO REGULATE ACCESS TO THE POTOMAC.

A. Maryland's Ownership Of The Potomac Includes The Right To Regulate Access.

In arguing that the Compact of 1785 and the Black-Jenkins Award of 1877 "do not give Maryland the authority to regulate Virginia's Potomac River access rights," VA Br. at 75, Virginia fundamentally misdirects the pertinent inquiry to be made at this juncture in this case. The Commonwealth does not dispute that Maryland is the owner of the Potomac to the low-water mark on the Virginia side of the river, nor does it disagree with the well-settled rule that such ownership includes the right to regulate activity that takes place in the river. Virginia thus misstates the question in terms of whether the Compact or the Black-Jenkins Award gives Maryland the authority to regulate, as that authority is a basic aspect of any State's ownership and sovereign control of a river within its borders. *See, e.g., Utah Division of State Lands v. United States*, 482 U.S. 193, 195 (1987); *Illinois Central Railroad Co. v.*

Illinois, 146 U.S. 387, 452 (1894); *Atlee v. Packet Co.*, 88 U.S. 389, 393 (1874).[1] In light of the Special Master's prior determination that "[t]he Compact neither addressed ownership of the bed of the River nor altered ownership of the shores of the River," Mem. of Dec. No. 4 at 20-21, the issue is not whether the Compact or the Award gives Maryland any right to regulate, but rather whether either confers a right to build wharves and other improvements in the Potomac that Maryland cannot regulate. Virginia points to no language in the Compact, the Black-Jenkins Award, or any other source of authority that supports its argument that such a right exists.

As Virginia made clear during the same time frame in which the Compact was drafted, the Commonwealth was well aware of the "rights of property, jurisdiction, and government" when it included this language in its 1776 Constitution and relinquished those rights "and all other rights whatsoever" in the territory described in the Maryland charter, subject only to limited navigation, access, and property claims that it reserved with respect to the Potomac and Pocomoke rivers. *See Maryland v. West Virginia*, 217 U.S. 1, 23 (1910) (quoting Virginia Constitution). Virginia reiterated its understanding of these rights when it enacted legislation three years after the Compact was formed that "for ever ceded and relinquished to the Congress and government of the United States, in full and absolute right, and exclusive jurisdiction as well of soil," property for the formation of "the permanent seat of the general government." MD Ex. CC-7. *See also Handly's Lessee v. Anthony*, 18 U.S. 374, 377 (1820) ("And in January, 1781, the Commonwealth of Virginia yielded to the

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[1] Contrary to Virginia's contention, Maryland does not rely on "Maryland state law" (VA Br. at 100) for this proposition but rather on settled federal common law principles that the Court has recognized time and again in the cases cited above and other decisions cited in Maryland's principal brief at 25-37.

United States 'all right, title, and claim, which the said Commonwealth had to the territory northwest of the river Ohio'").[2]

No comparable language is found anywhere in Article VII of the Compact, which provides only that the "citizens" of each State shall have "full property in the shores of Patowmack river adjoining their lands" and the "privilege of making and carrying out wharfs and other improvements." (App. 3a.) While Virginia argues that "[t]hese provisions say nothing about giving Maryland the right to regulate," VA Br. at 75, no need existed to do so. Maryland had that right because it owned the Potomac and Virginia had already recognized this in its Constitution when it stated that the Commonwealth had no rights of "jurisdiction, and government" with respect to the Potomac. Article VII contains no language that seeks to reverse this posture, either by giving any authority to Virginia or by taking any away from Maryland. Just as Massachusetts's "right of preemption of the soil" and "the estate, right, title and property" in the Treaty of Hartford did not strip New York of its "Government Sovereignty and Jurisdiction" over such interests in the bed of Lake Ontario, *see Massachusetts v. New York*, 271 U.S. 65, 85 (1926), the mere statement in the Compact that the citizens of each State shall have "full property" does not vest Virginia with authority over the exercise of their "privilege" of building wharfs and other improvements in the Potomac, particularly in light of Virginia's broad relinquishment of "all the rights" of "jurisdiction, and

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[2] Virginia's concession of sovereignty over the Potomac fits with the common understanding of sovereignty in the late Eighteenth Century. As demonstrated by historian Jack Rakove, Americans at that time had a "pragmatic understanding" of sovereignty under which "a state could freely yield or modify its authority to exercise certain powers without committing itself to a wholesale renunciation of others," and "States, and especially state legislatures, were jealous of these powers, and did not abandon their authority freely or glibly." MD Ex. A at 21.

government, and all other rights" with respect to that territory that "may at any time heretofore have been claimed by Virginia." *Maryland v. West Virginia*, 217 U.S. at 23 (quoting Virginia Constitution).[3]

Virginia disputes neither the express renunciation of jurisdiction and government over the Potomac that it made in its Constitution, nor Maryland's response to even the limited claim that Virginia asserted with respect to the use and navigation of the river. *See* Lucas & Deaver, eds., *Proceedings of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Ex. 20) (declaring "that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert" and that "the sole and exclusive jurisdiction over the said river Potowmack . . . belongs to this state"). Virginia's failure to produce any evidence to the contrary is significant in light of the Special Master's previous observation that "[n]othing in the Compact does anything other than *confirm* existing rights in or on the River," Mem. of Dec. No. 4 at 20 (emphasis in original), because it proves it is uncontroverted that both States shared the clear understanding at the time the Compact was formed that Virginia's existing "rights" in or on the Potomac were quite limited. *Accord* Robert A. Rutland, *The Papers of James Madison*, Vol. 8, at 10 (Tidewater Ex. 34) (letter from Madison to Jefferson recognizing that the Virginia Constitution effectuated "an entire relinquishment of jurisdiction" over the Potomac). Maryland's recognition of those rights

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[3] *See also* Rakove Declaration, MD Ex. A at 20-21 (stating that the Mount Vernon Compact is "consistent with both the state's conception of its sovereignty and the idea, fundamental to the Founding era, that such diminutions of a state's sovereignty as it chose to make had to be phrased in precise terms, with the residual authority not surrendered remaining among the larger body of police powers that the state retained").

in the Compact, like Delaware's "approval" of the exercise of an identical privilege from the New Jersey side of the Delaware River, did not constitute "an abandonment by the Sovereign of title to the soil." *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934). On the contrary, as the Court observed with respect to the effect that the very same Compact provision at issue in this case had on the "shores" of the Potomac, it "imports nothing as to the sovereignty over them." *Smoot Sand & Gravel Corp. v. Washington Airport*, 283 U.S. 348, 351 (1931).

Virginia proves both States' ability to address the exercise of such sovereignty over the Potomac by pointing out that "[w]hen the State of Maryland and the Commonwealth of Virginia intended to create a permitting system governing their respective uses of the Potomac River, they did so expressly." VA Br. at 76. While Article VII, as the Special Master has stated, "protects for all citizens of *both* States property rights in their lands adjoining the River," Mem. of Dec. No. 4 at 14 (emphasis in original), it does not expressly or implicitly establish a permitting system or any other kind of construct that in any way strips Maryland of – or vests Virginia with – any right of jurisdiction or government over the exercise of those rights. Rather, as the Court has observed, by recognizing that Virginia citizens had full property in the shores of the Potomac, the Compact "carried the jurisdiction and title to the water's edge." *Oklahoma v. Texas*, 260 U.S. 606, 633 (1923). The Compact does not give Virginia any authority beyond that point.

Arguing otherwise, the Commonwealth asserts that "[w]hen Virginia's Potomac River access rights were first codified in Article VII of the Compact of 1785, the boundary line was hotly contested." VA Br. at 91. Virginia produces no evidence to supports its argument that the boundary line was in dispute and instead relies entirely upon passages from decisions rendered long after the Compact was written in which the status of the boundary as of 1785

was not even at issue.[4] Virginia's Constitution, the response of the Maryland delegation, and other contemporaneous sources make clear that there was, in fact, very little dispute about Virginia's claims to the Potomac.[5] The first evidence of Virginia even having *investigated*

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[4] For example, in *Marine Ry. & Coal Co. v. United States*, the issue before the Court was the boundary line as of 1921, not 1785. *See* 257 U.S. 47, 63-64 (1921). While the Court noted that the boundary line was not settled until 1877, the extent of any dispute was narrow: "[t]hat the original title of Maryland extended at least to low water mark on the Virginia side it now is too late to deny . . . ." *Id.* at 63. Similarly, *Morris v. United States* involved title to lands on the *Maryland* side of the river and the boundary on the Virginia shoreline was not at issue. With respect to that boundary, the Court stated that "[t]he record discloses no evidence that at any time any substantial claim was ever made by Lord Fairfax . . . to property rights in the Potomac river, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river private persons." 174 U.S. 196, 224-25 (1899). Finally, while the Maryland Court of Appeals in *Barnes v. State*, 186 Md. 287, 47 A.2d 50 (1946), discussed the history of the Compact, the issue before it involved criminal jurisdiction over the river as of 1945, not 1785. None of these cases supports Virginia's contention that the boundary line was "hotly contested" when the Compact was written.

[5] For example:

- In 1787, Edmund Randolph, one of the Virginia commissioners appointed to negotiate the Compact, stated that one of the reasons for joining the Federal union was that, if Virginia did not, it would lose its Compact navigation rights on the Potomac because, "[i]f ever it should be decided on grounds of prior right, their [Maryland's] charter will inevitably determine it in their favor;" *see* 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. 1 at 75 (2nd Ed. 1836) (MD Ex. DD-1);

- In 1791, Maryland ceded for the formation of the District of Columbia territory which has repeatedly been held to have encompassed the Potomac. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 353-54 (1933); *Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. 47, 33-34 (1921); *Morris v. United States*, 174 U.S.at 230, 246-47; *United States v. Herbert Bryant, Inc.*, 740 F. Supp. 863, 864 (D.D.C. 1990).

- In 1804, Rep. John Randolph of Virginia stated that, as of the 1789 cession to the District, Virginia's "limits did not extend beyond high water mark on the western bank of the Potomac" and that whatever jurisdiction Virginia had over the Potomac was "entirely derived" from the Compact with Maryland and "was a jurisdiction not

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the possibility of a claim to the Potomac beyond the shores and strands comes in 1860, when the Virginia General Assembly dispatched Col. Angus McDonald to England to locate documents that might support a claim to the Maryland shore – a fact that Virginia does not dispute. *See* Reply Brief in support of Virginia's Motion for Partial Summary Judgment at 13 n.22.[6]

Virginia's argument fails even if the Court were to proceed on the assumption that the boundary line was in dispute when the Compact was written. Indeed, while the Compact specifically identified which State had criminal jurisdiction over "piracies, crimes or offences" that occurred "on that part" of the Chesapeake Bay and the Pocomoke River "where the line of division between the two states . . . is doubtful" (App. 4a), and also

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[5] (...continued)
within her limits." *Annals of Cong.*, 8th Cong., 2nd Sess., November 28, 1804, at 715 (Tidewater Exhibit 84);

- In 1804, Rep. Christopher Clark of Virginia stated that "[i]t had been stated, and generally agreed to, and he supposed was correct, that the State of Maryland, previous to her compact with Virginia, rightfully claimed the whole river Potomac to the high-water mark on the western bank." *Id.* at 719;

- In 1804, Rep. Joseph H. Nicholson of Virginia stated that "[p]revious to the compact between Virginia and Maryland, the latter claimed the river Potomac as its exclusive property" and that "Virginia had no power to make the cession of the Potomac [to the District], because she had not the jurisdiction over it, and could not grant more than she possessed." *Id.* at 721.

[6] In 1872, when the Maryland commissioners arrived at the negotiations that would eventually lead to the Black-Jenkins Award, they were genuinely surprised to learn that Virginia was asserting, for the first time, a claim to the entire width of the Potomac as her own. Tidewater Ex. 89 at 5. That claim was short-lived. When Virginia raised the claim in the Black-Jenkins Arbitration, Virginia's counsel immediately retreated, noting that "a true interpretation" would put the boundary at the middle of the river. (App. 17a.) Although the Arbitrators acknowledged that Virginia had certain rights in the river beyond low water mark, they rejected Virginia's attempt to show ownership of any part of the Potomac riverbed beyond that point. (App. 30a-31a.)

identified the circumstances in which each State could exercise criminal jurisdiction over crimes committed on the Potomac (App. 5a), Article VII says nothing about jurisdiction over the construction of wharves and other improvements in the Potomac. Although Virginia claims that "the only reasonable inference" from this silence "is that each state intended in Article VII to regulate the exercise of its *own* citizens' construction activities only," VA Br. at 96 (emphasis in original), that silence meant no such thing. It truly "would have astounded the drafters of the Compact of 1785," VA Br. at 92, to learn that, by recognizing that Virginia citizens had the same privilege as Maryland citizens to build wharves and other improvements in a river with respect to which Maryland asserted it had "the sole and exclusive jurisdiction" and "the State of Virginia hath not any right or title," Lucas & Deaver, eds., *Proceedings of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Ex. 20), Maryland's silence meant that it was relinquishing a fundamental aspect of its "ownership of the land underlying such waters." *Idaho v. United States*, 121 S.Ct. 2135, 2142 (2001). "[T]he silence of the Compact was on the subject of settled law . . . , which the parties' silence showed no intent to modify." *New Jersey v. New York*, 523 U.S. 767, 783 n.6 (1998).

There is also more than a little irony in Virginia's hyperbole that the Compact drafters would have been astounded by "the idea that Virginia's Potomac River access rights under Article VII could be regulated by Maryland." VA Br. at 92. The idea was not astounding to the Virginia Marine Resources Commission (VMRC), which has for decades referred Virginia shoreline projects to Maryland, not out of administrative comity, but out of the recognition and understanding that, as the VMRC informed one Virginia citizen in one of the hundreds of referral letters it has issued, "the Maryland Department of Natural Resources has

jurisdiction over waters of the Potomac River below mean low water and you may need a permit from them before you begin construction." MD Ex. BB-80. Nor was the idea astounding to the Virginia State Water Control Board (SWCB), which is charged by the Virginia Legislature to speak for the Commonwealth on matters involving water resources and Virginia's riparian rights,[7] and which has repeatedly counseled Virginians that it is Maryland that has the authority to regulate the construction of improvements such as boat ramps and dredging projects in the Potomac, not Virginia.[8] Nor was it astounding to Virginia's Counsel of Record in this case, who reviewed Maryland's unequivocal assertion of jurisdiction in its 1987 "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River," MD Ex. AA-11, and did not remark on, much less express astonishment at, the idea, MD Ex. AA-7, despite the fact that he was well aware of the Compact of 1785 and Virginia's assertion of its riparian rights under the Compact during the negotiations surrounding the Low Flow

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[7] *See* Va. Code Ann. § 62.1-44.41; Letter from Virginia Attorney General to the SWCB's Executive Secretary (Jan. 11, 1978), MD Ex. DD-9, VA-SRC-002135 (stating that the riparian right to use the Potomac River is a water resource of the State on which the Board can speak).

[8] *See* MD Ex. CC-27 (May 3, 1979 letter from the SWCB referring the Northern Virginia Regional Park Authority to Maryland for review of the Park Authority's proposed boat ramp and stating that "[w]hile the work you have described will take place on the Virginia shoreline, any work done in the waterway will take place in the Potomac River and will be under the jurisdiction of the State of Maryland."); MD Ex. BB-348, MD-MDE-13180-01 (SWCB letter dated January 25, 1979, stating that the effect on seafood of dredging of Potomac in connection with proposal to build docking facility on Virginia shoreline "is out of our jurisdiction" because the "channelward of mean low water . . . comes under the jurisdiction of the State of Maryland").

Allocation Agreement of 1978. *See* VA Ex. 182.[9]

There simply was and still is nothing remarkable about Maryland's regulation of Virginians' access rights, thus proving that much more than silence is needed before the conclusion can be reached that "the compact limits or restricts one state's sovereignty vis-à-vis the other state." VA Br. at 99. Contrary to Virginia's contention that the rule of construction is different when an interstate compact is involved, VA Br. at 97-99, the same rule applies whether interpreting a compact, *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 479 (1908), a treaty, *Massachusetts v. New York*, 271 U.S. at 89, or a royal charter, *Martin v. Waddell*, 41 U.S. 367, 414 (1842): "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935) (citing *Massachusetts v. New York*, 271 U.S. at 89). Mere silence is not enough to overcome the presumption that the owner of the lands underlying the Potomac – which was never in serious question and, as subsequent events conclusively proved, is Maryland – retained its sovereign "control over the waters above them," *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452, including "control over the location, erection, and use of such wharves and landings," *Atlee v. Packet Co.*, 88 U.S. at 393, that the Compact recognized citizens on both

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[9] The list goes on: Virginia agencies and political subdivisions such as the Virginia Department of Health (MD Ex. CC-32), Fairfax County (MD Ex. CC-37), King George County (MD Ex. CC-30), and the Town of Colonial Beach (MD Ex. CC-35) have all stated unequivocally that Maryland has the authority to regulate the exercise of riparian rights in its territory.

sides of the river had the privilege "of making and carrying out."[10]

Maryland confirmed its understanding that the Compact did nothing to divest it of such control over wharves and other improvements when it enacted legislation shortly after ratifying the Compact that ceded territory for the formation of the District of Columbia and vested the commissioners appointed by the President with licensing authority over the building of wharfs in the Potomac in that territory. MD Ex. CC-1. While Virginia argues that this licensing authority pertained to construction occurring only on Maryland's side of the Potomac, VA Br. at 80-85, this argument proves Maryland's point: the Compact is utterly silent on a key aspect of sovereignty that Maryland, when it intended to, relinquished in explicit terms in its cession of property to the federal government. Had Maryland's cession of this land automatically carried with it Maryland's sovereign authority over it, there would have been no need for Maryland to expressly provide the commissioners with such authority. That it did so manifests Maryland's plain understanding that the sovereign right to regulate the construction of wharves is a fundamental component of its ownership of the Potomac. The Compact simply did not address this authority, much less give it to Virginia.

Virginia's evidence also reaffirms the understanding of Maryland and others that Maryland's ownership of the Potomac included the entire river. Indeed, the description of the property to be ceded included a specific reference to Jones Point, Virginia and was first set forth in a Presidential Proclamation dated March 30, 1791. *See* Dorothy Twohig, *The*

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[10] Rather than address this point, Virginia addresses at length an argument Maryland has never made, namely, that Maryland "has the right to cut off Virginia's water supply." VA Br. at 116. While the Compact does not contain any language that gives Virginia citizens an unrestricted right of access to the Potomac, Maryland has never disputed, as Virginia suggests that it has, that they have a right to withdraw water. Maryland argues only that it has the authority to regulate that right if it is exercised within Maryland territory.

Papers of George Washington, Vol. 8, at 27 (1999) (VA Ex. 279B). That description is identical to the property description in the law that Maryland enacted several months later. Citing that law, the Court observed 140 years later that Maryland, not Virginia, was the source of the United States' authority to regulate construction on the Virginia side of the river lying within the District of Columbia. Addressing the request for "a writ of mandamus to compel the Secretary of War and the Chief of Engineers to authorize the construction of a wharf in the Potomac river within the District of Columbia adjacent to their land on the Virginia shore," *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 353 (1933), the Court stated that "title" to and "sovereignty over" that portion of the river "were vested in the United States by cession from the state of Maryland of the area constituting the present District of Columbia." *Id.* at 354. *See also Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. 47, 33-34 (1921); *Morris v. United States*, 174 U.S. 196, 230, 246-47 (1899). This statement refutes Virginia's contention that the Compact gives that sovereignty to the Commonwealth.

B. The Black-Jenkins Award And The Two States' Treatment Of The Boundary Line Set Forth In The Award Reinforce Maryland's Right To Regulate Access To The Potomac.

In conclusively establishing Maryland's ownership of the lands beneath the Potomac up to the low-water mark on the Virginia side of the river, the Black-Jenkins Award confirmed Maryland's authority over the Potomac to that point. The Arbitrators relied upon the settled rule that was "well illustrated" in *Ingersoll v. Howard*, 54 U.S 381 (1851), namely, that a boundary that runs "along" the far bank of a river includes the entire river, and concluded, based on language in the 1632 Charter giving to Lord Baltimore land "to the further bank" of the Potomac, that "[t]he intent of the charter is manifest all through to

include the whole river within Lord Baltimore's grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*." (App. 19a.) *See also Handly's Lessee v. Anthony*, 18 U.S. at 379 ("[W]hen, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only."). Virginia ignores this language and the Commonwealth's disclaimer that "[t]his case is not about changing the boundary line that was set up by the Black-Jenkins Award," VA Br. at 1, and states – incorrectly – that "[i]n the arbitrators' view, Virginia's rights in the River were equivalent to ownership by express grant, entitling Virginia to use of the Potomac River 'to the middle of the channel.'" *Id.* at 78 (quoting App. 41a). As demonstrated by the portions of the Arbitrators' Opinion that immediately precede and follow the passage containing this quote, the Arbitrators were not discussing the Potomac but rather Smith's Island. *See, e..g.*, App. 38a ("We must now go back to Smith's Island."); App. 42a ("We run to Sassafras Hammock and from that to Horse Hammock, because we cannot in any other possible way give Virginia the part of Smith's Island to which she shows her right by long possession.").

Rather than place the boundary at the usual high-water mark that accompanies such a grant, the Arbitrators placed it at the low-water mark based on the doctrine of prescription and acquiescence. (App. 29a.) The Arbitrators squarely rejected, however, the Commonwealth's contention – which is the same contention that it makes in this case – that her ownership extended beyond the low-water mark. Stating that Virginia's "efforts to show that she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part, have been less successful" (App. 30a), the Arbitrators determined that the evidence before them demonstrated "satisfactorily that Maryland had granted all the islands, taxed the

owners, and otherwise exercised proprietary and political dominion over them." (App. 31a.) Declaring that "[t]hree Virginia grants were produced which purported to be for islands in the Potomac, but on examination of the surveys it appeared that they were not *in*, but *upon*, the river" (*id.*) (emphasis in original), the Arbitrators concluded that "[a]ll are on the Virginia side of the low-water mark, which we have said was the boundary between the States." (*Id.*)[11] It is extremely doubtful that the Arbitrators would have concluded that the Commonwealth's ownership to the low-water mark did not extend beyond that point if they

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[11] In light of the Arbitrators' rejection of Virginia's contention that the Commonwealth had any ownership rights in the bed of the river beyond low-water mark, Virginia misplaces its reliance on cases involving "questions of equitable apportionment of an interstate stream." VA Br. at 101. Not one of these cases involved one State's efforts to withdraw water from the territory of another State, thereby implicating the sovereign rights of the State within which the river flows – both in the waters themselves and the submerged lands that are particularly bound up with sovereignty. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (emphasizing the State's "sovereign control" over submerged lands which have "a unique status in the law" and are "infused with a public trust the State itself is bound to respect"); *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("We have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters."). Virginia cites no case that questions a State's authority to regulate water withdrawals from its own territory, much less the placement of structures on State-owned submerged lands, because the established law is to the contrary. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (giving at least four reasons why the Court "is reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage"). While Virginia finds significance in the Court's observation in *Sporhase* that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State," 458 U.S. at 957, this does not mean, as Virginia implies, that imposing the same restrictions on the citizens of other States constitutes such discrimination. Rather, the Court simply made the point that Nebraska could not be said to be discriminating against other States when it imposed the same restrictions on its own citizens. Indeed, in the very next sentence that Virginia does not quote, the Court noted that "[a]n exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation." *Id.* So it is in this case, where Marylanders and Virginians alike must obtain the same Maryland permits to withdraw water from, or place structures in, the Potomac.

shared Virginia's view that "Maryland fully conceded during the arbitration that Virginia had the right to construct improvements from the shoreline in her own discretion." VA Br. at 78.[12]

The subsequent conduct of both States and their citizens conclusively proves that they construed the boundary line set forth in the Award as the absolute line of sovereignty in all respects.[13] That conduct is not only relevant "to a *defense* that rights protected by the

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[12] Rather than make such a concession, Maryland unequivocally opposed before the Arbitrators Virginia's attempt to assert any authority over the Potomac. In summarizing Maryland's position for the Arbitrators, Maryland's counsel explicitly stated not only that Maryland was the owner of the Potomac to the bank on the Virginia side of the river, but also that, in direct response to the Virginia Constitution's recognition in 1776 of Maryland's authority over the river, the people of Maryland "did not hesitate, formally by resolutions in their Convention, on the 30th day of October, 1776, to protest against Virginia's pretensions to jurisdiction even over the 'shores and strands' on the southern side of the Potomac." Synopsis of Argument made by Pinkney White at 19, VA Ex. 123. That limited claim was not the focus of the arbitration proceedings, however, but rather Virginia's new assertion that it was the owner of the Potomac "either to the north bank of that river, or to the middle of the stream[.]" *Id.* at 22. In response to that assertion, Maryland concluded its argument by stating that the boundary line "at the very least" was at the low-water mark on the Virginia side and followed the river around wharves and improvements built there (*id.* at 36), but this hardly constitutes a relinquishment of Maryland's rights in the river and sovereign authority that accompanies such rights. Instead of viewing Maryland's statements that way, the Arbitrators drew the boundary line at low-water mark and respected Maryland's sovereignty by providing that Virginia's exercise of the right to use the Potomac beyond that line could be made only without impeding navigation "or otherwise interfering with the proper use of it by Maryland." (App. 49a.) Maryland's regulation of the Potomac is one such use.

[13] Even before the Award was made, the understanding existed that Maryland permission was needed to withdraw water from the Potomac. Virginia does not dispute that Congress came to Maryland, and not Virginia, when it sought to procure water from the Potomac River for the District of Columbia. While Virginia argues that this was because "the Army Corps of Engineers had already recommended that the intake for the water supply be on the *Maryland shore* of the River at Great Falls," VA Br. 85 (emphasis in original), it ignores the fact that the intake was being supplied through the construction of a dam that extended "all the way across the River to the Virginia shore" (*id.* at 86) and, therefore, would be withdrawing water from the entire Potomac, not just the Maryland shore. That Congress came to Maryland for its approval for the project shows that Congress understood Maryland

(continued...)

compact were subsequently lost," VA Br. at 90 (emphasis in original), but also informs the meaning of the Award itself and the "practical construction" that both States and their citizens have subsequently given it. *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933). *See also Air France v. Saks*, 470 U.S. 392, 396 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Massachusetts v. New York*, 271 U.S. at 94. That conduct has consisted of a broad range of activities that, since the time the boundary line was conclusively settled, has evidenced the understanding both States have consistently shown, through the actions and words of their officials and citizens, that Maryland's sovereignty over the Potomac begins, and Virginia's ends, at the low-water mark on the Virginia side of the river.

Virginia is thus wrong in asserting that none of these many other "activities has anything whatsoever to do with Virginia's right to withdraw water from the Potomac River or to build improvements from the shore." VA Br. at 89. Just as it is "appropriate," as the Commonwealth concedes, "to consider whether the two states have imposed real property taxes on improvements extending from the Virginia shore," (*id.*), it is also proper to examine

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[13] (...continued)
to have jurisdiction over construction in, and the withdrawal of water from, the Potomac and that Virginia had jurisdiction only over the abutments on the Virginia shore.

The history surrounding the passage of the legislation authorizing this project underscores this understanding. The proviso requiring that the President obtain the assent of Maryland was initially included in an amendment offered by Sen. Pratt of Maryland, who stated in the ensuing debate that Maryland's assent was necessary because "the whole Potomac river belongs to the State of Maryland up to the low-water mark on the Virginia shore." *Congressional Globe* (Feb. 28, 1853), MD Ex. DD-2, at 901. At no point in the debate did any member of the Virginia congressional delegation claim that Virginia owned any portion of the Potomac or otherwise object to Maryland's pointed assertion of its sovereignty over the river. To the contrary, when the Virginia legislature acted to give its assent to the project, it reached only the abutments and quarries on the Virginia shore. *See* VA Ex. 294.

other regulatory actions taken with respect to such improvements that reflect the two States' understanding that the boundary line set forth in the Black-Jenkins Award defines the line of sovereignty for all purposes. Indeed, while the Attorney General of Virginia had at one time expressed the view that the Compact made "exempt" from the "power of Maryland" property attached to the Virginia side of the Potomac, *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1, 9 (1861), after the Black-Jenkins Award was rendered in 1877, his successors consistently recognized, as did agencies and citizens on both sides of the Potomac in a variety of contexts, that the "power of Maryland" began on the Maryland side of the boundary line described in the Award, without regard to the nature of the activity involved. Those recognitions bear directly on the construction to be given to the boundary line established by the Award.

In arguing that "virtually all of Maryland's evidence on these subjects arose *after* 1950," VA Br. at 89 (emphasis in original), Virginia fails to refute any of the evidence produced by Maryland to show that both States have treated the boundary line as an absolute line of sovereignty since the time the Black-Jenkins Award was made. Virginia does not dispute that Maryland has regulated dredging, mining, and extraction activities in the Potomac since 1888, nor does Virginia dispute – on the contrary, it has conceded – that it has not regulated those activities since at least that time. MD Ex. CC-16, ¶ 162. Virginia also does not dispute that, since at least 1900, it not only has not enforced any gambling, gaming, health, or occupational safety laws beyond the low-water mark, but also that it does not even have any laws providing for general criminal jurisdiction with respect to activities occurring either in the Potomac "or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." MD Ex. CC-14, ¶¶ 7, 10. The Commonwealth also does not refute

that it recognized almost a century ago that Maryland does have jurisdiction in those circumstances, *see* July 2, 1906 Va. Att'y Gen. Op. 87 (MD Ex. CC-8), and similarly produces nothing to contest the evidence set forth in Maryland's principal brief (at 51-56; 60-61; 63-75) demonstrating that the Commonwealth has benefitted from Maryland's exercise of authority to achieve what Virginia could not, due to its uncontroverted lack of power.[14]

Virginia also does not dispute the many express and unqualified opinions its Attorneys General have made over the course of the century following the Black-Jenkins Award in which the highest law enforcement office of the Commonwealth acknowledged, starting in 1906, Virginia's utter lack of any "legal right," July 2, 1906 Va. Att'y Gen. Op. 87 (MD Ex. CC-8); "authority," June 21, 1935 Va. Att'y Gen. 147 (MD Ex. CC-9); *accord* July 30, 1952 Va. Att'y Gen. Op. 116 (MD Ex. CC-12); "jurisdiction," September 1, 1944 Va. Att'y Gen. Op. 91 (MD Ex. CC-10); or "territorial jurisdiction," July 13, 1948 Va. Att'y Gen. Op. 118 (MD Ex. 11), over a broad range of activities occurring beyond the low-water mark on Virginia's side of the Potomac. Virginia cannot, of course, retract these unambiguous

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[14] This evidence also belies Virginia's claim that one State is "systematically incapable of adequately protecting the interests of a sister state." VA Br. at 103. Rather than produce evidence that might create a genuine issue of material fact, Virginia instead devotes a number of pages decrying "Maryland's recent treatment of the FCWA." VA Br. at 106. In doing so, Virginia also ignores the undisputed evidence that, notwithstanding the Commonwealth's apparent distrust of the Maryland administrative and judicial process, it was through that very process that the Fairfax County Water Authority received a permit allowing it to construct the waterway intake pipe that lies at the heart of the present controversy between the two States. That evidence refutes Virginia's irrelevant and one-sided version of purported facts that it claims show an "overwhelming" appearance of "political manipulation to block the FWCA's project." VA Br. at 110. While Maryland will not engage in a point-by-point refutation, Virginia's accusations of anti-Virginia political influence are also rebutted by the Declaration of the Secretary of the Department of the Environment, Jane T. Nishida, who states unequivocally that the decision to deny the permit was neither politically influenced nor based on comments concerning economic competition between the two States. *See* MD Ex. EE.

acknowledgments of Virginia's lack of jurisdiction and authority, nor can it produce any evidence to contradict them, and so instead Virginia attempts to sidestep these opinions on the ground that none "held that Virginia was subject to Maryland's authority with respect to the withdrawal of water or the construction of improvements from the Virginia shore." VA Br. at 163. This does not change the undisputed fact that all of the opinions recognized that Virginia had no authority at all beyond the low-water mark. Indeed, the only time that even Virginia claims its Attorneys General have ever "reaffirmed Virginia's compact rights" (VA Br. at 163) beyond low-water mark has been in connection with "the right to fish." March 9, 1955 Va. Att'y Gen. Op. 117, 118 (VA Ex. 311). *Accord* June 23, 1927 Va. Att'y Gen. Op. 182 (VA Ex. 310). In all other matters, including those involving the right to build piers and wharves, it is undisputed that the Virginia Attorney General has treated the boundary as an absolute line of sovereignty.

In fact, two of the opinions cited above specifically acknowledge that the exercise of the right to build a pier from the Virginia side of the Potomac does not vest Virginia with, or strip Maryland of, any authority over that portion of the pier that extends beyond the low-water mark. In response to a question concerning Virginia's jurisdiction over a pier affixed to the Virginia side of the Potomac, the Commonwealth's Attorney General stated expressly that the "territorial jurisdiction of the Commonwealth ends at the low-water mark," notwithstanding any exercise of the "privilege of building piers" set forth in the Compact, with the result that any "portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth." July 13, 1948 Va. Att'y Gen. Op. 118 (MD Ex. CC-11). Two decades later, in response to another question concerning Virginia's authority over a pier

built from the Virginia side of the river, the Virginia Attorney General again focused on the "right to build a pier or wharf" and stated that "the lawful exercise" of such a right "would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (MD Ex. CC-13). Each of these opinions recognized and did not question that Maryland exercised authority over that part of the pier lying beyond the low-water mark. Each also makes clear, as do the other Virginia Attorney General opinions dating back to the beginning of the 1900s, that the jurisdiction and boundary of the two States are one and the same under the Black-Jenkins Award without regard to the activity in question, including the exercise of any Compact rights.

Perhaps more importantly, Virginia simply misses the significance of the opinions of its Attorneys General. Those opinions, when considered in conjunction with the hundreds of other exhibits that Maryland has produced, evidence a clear and uniform understanding handed down from generation to generation from the time of the Black-Jenkins Award, through the turn of the next century, and reaffirmed continuously through the present in a multitude of ways that Maryland has identified in those exhibits and that Virginia has not refuted. While much of this evidence consists of conduct that Maryland has been able to document for the last 50 years, the various opinions of the Virginia Attorneys General prove that this conduct did not suddenly materialize out of thin air but, rather, has roots that trace back to long before and is based upon a documented historical chain of custody that links the last half century with the contemporaneous interpretation that both States shared when the boundary between them was conclusively identified in 1877. That shared interpretation – that the Award's boundary line between the States represents an absolute line of sovereignty,

regardless of the activity in question – "is good indication of its meaning." *New Jersey v. New York*, 523 U.S. at 831 (Scalia, J., dissenting).

Virginia offers no evidence that even suggests the two States interpreted the boundary line in any other way. Virginia's response to Maryland's evidence concerning real property taxation activities only confirms that both States have treated the boundary line as the line of sovereignty. Virginia argues that there are more than 300 piers, docks, and boating ramps extending from the Virginia side of the Potomac beyond the low-water mark that its localities tax and Maryland does not, VA Br. at 134, but it omits the reason why this is so. As set forth in the declarations filed in support of Virginia's brief, these structures are taxable by Virginia's localities as part of the value of the real property to which they are attached on Virginia's side of the low-water mark. *See* VA Ex. 127, ¶¶ 3-4; VA Ex. 131, ¶ 3. Maryland's taxation of these structures would not only amount to double taxation, but would also be tantamount to taxing land in Virginia. In cases where that connection is absent, *i.e.*, when the structure on Maryland's side of the low-water mark has value independent of the land in Virginia, Maryland taxes those properties and, as Virginia's declarations confirm, Virginia does not. *See* VA Ex. 127, ¶ 4; VA Ex. 131, ¶ 3. Indeed, Virginia taxes only the pier or deck extending from the Virginia shore to the structure, but not the "offshore property and improvements." VA Ex. 127, ¶ 4. Virginia has also conceded that it has not imposed any sales, use, litter, entertainment, personal property, or income taxes on any activities or structures located beyond the low-water mark of the Potomac. MD Ex. CC, ¶ 13.

While Virginia attempts to minimize the significance of the two States' respective tax treatment of these properties by asserting it involves "a handful of establishments," VA Br. at 132, Virginia does not deny that, in fact, Maryland has identified the entire universe of

establishments that have been built off the Virginia side of the Potomac. As to that universe, the evidence is undisputed that Maryland has imposed real property taxes since at least 1952, MD Exs. F, H, W, that Maryland has for an even longer period imposed a number of other taxes, issued licenses, policed, and taken numerous other regulatory actions with respect to these and many other properties and activities on piers and wharves on the Virginia side of the Potomac, MD Exs. B through BB, and that Virginia, in contrast, has not done so *and* has not objected to Maryland's regulatory activities. MD Ex. CC-14, ¶¶ 11, 12, 13, 14.[15] Just as significantly, Virginia has not identified a single regulatory action that it has ever taken with respect to any activity that takes place on Virginia's side of the Potomac River beyond low-water mark. The only authority, of any kind, that the Commonwealth claims it has exercised beyond the boundary line is in the form of real property taxes, but the justification for this taxation is not that Virginia has authority over improvements built from the Virginia side wherever those improvements may lie. Rather, as Virginia's own declarations state, these piers, wharves, etc. are taxed as part of the value of the land in Virginia to which they are affixed. The exercise of that limited authority, when contrasted with the localities' deliberate decision not to tax improvements that do not have such a connection to the real property, proves yet again the two States' deeply rooted understanding that the boundary line represents an absolute line of sovereignty.

This same understanding, not the Clean Water Act as Virginia claims, VA Br. at 151-54, is also the explanation for Virginia's recognition that Maryland regulates waterway

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[15] In light of the evidentiary showing it has made, Maryland's evidence is hardly comparable to what Kentucky relied upon in claiming sovereignty over the Ohio River, namely, "that Kentucky has imposed a property tax on only 3 of the 15 structures that extend out, into, or over the water from the Illinois shoreline." *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991).

construction activities beyond the low-water mark. Virginia's post hoc attempt to explain away the hundreds of letters the Virginia Marine Resources Commission (VMRC) has written referring applicants to Maryland is belied by the letters themselves, which make no reference of any kind to the Clean Water Act as the Commonwealth's justification for informing its citizens that Virginia does not have jurisdiction over their permit requests but that Maryland does. Indeed, rather than cite the Clean Water Act as the reason why Maryland has jurisdiction, one of those letters explicitly cites the Compact as the basis for Maryland's authority over construction in the Potomac beyond low-water mark. MD Ex. BB-346 at VA-MRC-F-00354. These letters from the Virginia agency charged with managing the Commonwealth's public trust responsibilities over its submerged lands, *see* Va. Code Ann. § 28.2-1205 – acknowledging that it is Maryland, and not Virginia, that has jurisdiction over the placement of structures beyond the boundary line in the Potomac – have not been refuted by any evidence from Virginia and are yet further proof of how both States have recognized that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Alderman of New Jersey*, 209 U.S. 473, 593 (1908), by treating the boundary set forth in the Black-Jenkins Award as "the jurisdictional line." *Morris v. United States*, 174 U.S. at 218.[16]

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[16] There is also no merit in any of Virginia's other efforts to reduce the legal significance of these letters. The fact that Maryland processed many Virginia applications through a "letter of no objection" rather than a full wetlands license does not undermine Maryland's authority, particularly when Maryland developed the 1987 Virginia shoreline policy and regulations to accommodate *Virginia's* request. *See* MD Ex. AA-12. The documents surrounding the development of that policy evince not the slightest doubt about Maryland's jurisdiction. *See* MD Exs. AA-1-13. Similarly, while Virginia argues that the fact the VMRC "does not issue any permits for the use of bottom lands beyond the boundary line" does not mean that

(continued...)

While Virginia places heavy reliance on several statements made in connection with the Low Flow Allocation Agreement, none of those statements refutes the two States' interpretation and treatment of the boundary line as a uniform demarcation of sovereignty. First, the statements are limited to the area of water appropriation, were not expressed until the mid-1970s, and are hardly enough to cast doubt upon, much less nullify, a full century of statements, actions, and opinions from each State evidencing their longstanding view and multi-faceted treatment of the boundary line set forth in the Black-Jenkins Award as an absolute line of sovereignty. *Cf. Georgia v. South Carolina*, 497 U.S. 376, 391 (1990) (agreeing that, notwithstanding actions it took since 1955, "Georgia asserted no act of dominion or control over the Barnwell Islands from 1787 until the 1950's, and acquiesced in South Carolina's jurisdiction through long inaction in the face of the latter's continuing and obvious exercise of dominion since 1795").

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[16] (...continued)
"Maryland has the authority to control the rights of Virginia and its citizens," VA Br. at 159, the letters do not simply inform Virginia applicants that no Virginia permit is required but rather contain affirmative admissions, in letter after letter, that Maryland has jurisdiction beyond the low-water mark and that a Maryland permit may be required. Finally, while Virginia attempts to argue that these letters have no legal significance because they are merely statements of its "staff" as opposed to its "policy-making commissioners" (VA Br. at 159), Virginia ignores that it is the staff of the VMRC that actually does the work of the Commission, including routinely making jurisdictional determinations, *see, e.g.*, MD Exs. BB-346 at VA-MRC-F-00354, MD Ex. BB, ¶¶ 39-43, and are the individuals who have first-hand experience concerning how the two States have identified their respective jurisdictions over their aquatic resources. In addition, Norman E. Larsen, a former Assistant Commissioner of the VMRC, presided over the VMRC's successful negotiations to help streamline the Maryland permitting program for Virginia landowners and wrote many of the letters himself. *See, e.g.*, MD Exs. AA-2; BB-21 at VA-MRC-00186. Similarly, William A. Pruitt, the Commissioner of the VMRC, was provided a copy of Maryland's 1987 Policy when it was adopted and notified that the VMRC was circulating it to the Virginia counties for their use. MD Ex. AA-12.

Second, as set forth more fully in the next section, despite these statements, the evidence is undisputed that Virginia has continued to participate in Maryland's water appropriation permitting program, and Maryland has continued to insist that Virginia was and still is required to do so. It is thus uncontroverted that both States continued to adhere to their prior century-long interpretation and treatment of the Black-Jenkins boundary as the line of sovereignty. That interpretation and treatment are entitled to significant weight and confirm that Maryland did not relinquish any sovereign authority over the Potomac when it ratified the Black-Jenkins Award.

II. VIRGINIA'S ACQUIESCENCE IN MARYLAND'S ASSERTION OF SOVEREIGNTY OVER THE POTOMAC EXTENDS TO ALL EXERCISES OF REGULATORY AUTHORITY, INCLUDING THE REGULATION OF WATERWAY CONSTRUCTION AND WATER APPROPRIATION.

The same evidence that substantiates the mutual understanding of both States that the boundary line is an absolute line of sovereignty also confirms that Virginia has acquiesced in Maryland's regulation of the Potomac, without reserving any special exceptions for waterway construction or water appropriation activities. This mutual understanding is the reason why previously there "has been no case or controversy" and no need for the Court to exercise "original jurisdiction to resolve the questions now presented." VA Br. at 126. From the time of the Black-Jenkins Award until Maryland's denial of the Fairfax County Water Authority's permit request, Virginia consistently agreed, through the actions and words of its officials and citizens, that Maryland had the right to regulate the Potomac. During that one hundred twenty year time frame, there simply was no "dispute as to the boundary

between them." *New Jersey v. Delaware*, 291 U.S. at 376.[17]

There is no merit in any of Virginia's attacks on Maryland's acquiescence defense. *New Jersey v. New York*, which Virginia quotes for its opening contention that the defense "is inapplicable" in compact cases (VA Br. at 121), refutes rather than supports Virginia's argument. The Court's decision in that case makes clear that while the boundary line established by a congressionally-approved compact entered into between two States cannot subsequently be changed for "reasons of practicality and convenience," 523 U.S. at 810, a State may nevertheless acquire sovereign rights based on the doctrine of acquiescence and prescription even when a compact confers those rights on another State.

Although the Court in that case held that the Special Master could not for reasons of practicality and convenience adjust the boundary set forth in a compact between New York and New Jersey that Congress approved, the Court did not even allude to the rule that Virginia asserts governs here but, rather, provided a very different rationale in rejecting New York's affirmative defense that it acquired by acquiescence and prescription sovereign authority over the filled portions of Ellis Island. Following a 16-page discussion of that defense, *see id.* at 790-806, the Court held that there did not exist any "consistent understanding" of sovereignty over the Island and that "New York has shown nothing more than a modest number of sporadic acts that might be regarded as prescriptive." *Id.* at 805, 806. Such a lengthy discussion would have been completely unnecessary if, as Virginia

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[17] In light of the one hundred twenty year period that characterizes Virginia's acquiescence in Maryland's authority over the Potomac, Maryland thus does not need to rely upon the twenty year prescription period that the Arbitrators not once but three times stated "creates a right by prescription" (App. 28a) that confers ownership of and "title" (App. 40a) to territory upon one State regardless of whether that territory "originally belonged to the other." (App. 43a.)

contends, the acquiescence defense "is inapplicable in Compact cases." VA Br. at 121.

The Court discussed the issue of acquiescence because, contrary to Virginia's contention, acquiescence is a defense recognized by the Court in compact cases. Indeed, the Court first addressed the question whether New York had sovereignty over the filled portions of the Island under its compact with New Jersey. *See* 523 U.S. at 773, 780-85. After resolving that question against New York and holding that the compact conferred that sovereignty upon New Jersey, the Court addressed New York's "affirmative defense that it gained sovereign authority over the made land by subjecting it to prescriptive acts for a considerable period." *Id.* at 786. Thus, notwithstanding Virginia's assertion that a State may not acquire through the doctrine of acquiescence and prescription "rights protected by a federally-approved compact," VA Br. at 122, that is precisely what would have happened had New York met its "burden to 'show by a preponderance of the evidence . . . a long and continuous possession of, and assertion of sovereignty over' the filled portions of the Island, as well as New Jersey's acquiescence in those acts of possession and jurisdiction." *New Jersey v. New York*, 523 U.S. at 786-87 (quoting *Illinois v. Kentucky*, 500 U.S. at 384).[18] There is simply no merit in Virginia's argument that the acquiescence defense is inapplicable in compact cases. *See also Virginia v. Tennessee*, 148 U.S. 503, 522 (1893) ("Independently of any effect due to the compact as such, a boundary line between the states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and

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[18] The Court's application of the preponderance of the evidence standard in *New Jersey v. New York* also refutes Virginia's assertion that a "clear and convincing" standard of proof should apply in this case "where one state contends that the other state's acquiescence amounts to *abandonment* of rights protected by interstate compact." VA Br. at 132 n.473 (emphasis in original). That is exactly the contention that the Court in *New Jersey v. New York* deemed was governed by the preponderance of the evidence standard.

afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive."). *See generally Illinois v. Kentucky*, 500 U.S. at 387 (acquiescence defense considered notwithstanding "congressional language describing Illinois' boundary in the State's Enabling Act of April 18, 1818, ch. 67, 3 Stat. 428").

Virginia's contention that "the period of time upon which the defense is based is too short," VA Br. at 122, is equally without merit. While the Commonwealth does not expressly state what that time period is, it appears to believe that the period is defined by the number of years in which Maryland has issued waterway construction and water appropriation permits. *See id.* at 89. Virginia's argument is flawed because it is factually undisputed that Maryland has manifested its sovereignty over the Potomac, both before and after the Black-Jenkins Award, through the universe of authority that States typically exert over territory within their boundaries, not solely through the exercise of the waterway construction and water appropriation permitting activities that Virginia seems to think define exclusively Maryland's ownership of the river.

Indeed, rather than embrace Virginia's crabbed view of sovereignty when recognizing a State's "sovereignty by prescription and acquiescence," *Georgia v. South Carolina*, 497 U.S. at 392, the Court has focused on not just one discrete area but instead on all categories of activity that, when considered collectively, represent a sufficient exercise of sovereignty to deem that State to be the unquestioned owner of the territory in question. For example, in finding that South Carolina's boundary included islands claimed by both that State and Georgia, the Court considered not just a grant made by South Carolina containing the islands, but also "the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina

authorities, patrolling by South Carolina wildlife officers, and other factors." *Id.* at 392-93. Similarly, in finding that Louisiana's boundary included an island, Isle a Pitre, that Mississippi also claimed, the Court stated not only that "[t]he lands forming Isle a Pitre have been paying taxes to the state of Louisiana for years," but also that "[p]olitical and police control and jurisdiction by the parish of St. Bernard officials were exercised over the disputed area, and many instances are given of police control and jurisdiction by Louisiana officials over this general territory." *Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906).

Likewise, in holding that certain waters of Green Bay and the islands they contained fell within Wisconsin's boundary notwithstanding Michigan's claim to the contrary, the Court cited, among other factors, the fact that Michigan admitted in its complaint that "Wisconsin has for many years disregarded the true and rightful boundary, * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil criminal, and political jurisdiction over those portions of the territory within the Michigan boundaries above described . . . and has unlawfully taxed and still continues to unlawfully tax said property." *Michigan v. Wisconsin*, 270 U.S. 295, 317-18 (1926). *See also id.* at 306-07; 310-14. These cases are not unique but are typical of the cases in which the Court has upheld a State's acquiescence claim by examining a number of factors. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 567-71 (1940); *Maryland v. West Virginia*, 217 U.S. 1, 40-44 (1910); *Indiana v. Kentucky*, 136 U.S. 479, 509-10 (1890). *See also California v. Nevada*, 447 U.S. 125, 131-32 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 648-51 (1973).

Consideration of the same types of factors here confirms Virginia's acquiescence in Maryland's regulation of the Potomac. Maryland's unrefuted evidence shows that both States have treated the boundary as the line of sovereignty for all purposes since the time of

the Black-Jenkins Award, that Virginia's Attorneys General, other officials, agencies, and citizens have recognized time and again that Virginia's sovereignty ends – and Maryland's begins – at that point, and that Virginia has "never exercised, or attempted to exercise, a single right of sovereignty or ownership," *Indiana v. Kentucky*, 136 U.S. at 510, on Maryland's side of the boundary. This case is thus the polar opposite of decisions on which Virginia relies in which the Court "rejected the doctrine of prescription entirely." VA Br. at 125. Unlike *New Jersey v. Delaware*, for example, in which the Court quoted the special master's "statement that 'at no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey,'" 291 U.S. at 376, Virginia has never exercised any sovereignty over any portion of the Potomac beyond low-water mark and has repeatedly recognized Maryland's authority from that point to Maryland's side of the river.

Virginia has not produced any evidence that creates a genuine issue of material fact in the face of Maryland's undisputed proof showing multiple acts and statements of Virginia agencies and officials that evidence Virginia's acquiescence in Maryland's continued exercise of sovereignty up to the low-water mark. Instead, Virginia argues that "none of those persons or entities had the authority to waive or relinquish rights belonging to the Commonwealth under her interstate compacts with Maryland, and which are affirmatively set forth in the Virginia Code." VA Br. at 127. This statement reflects two fundamental misunderstandings of the doctrine of acquiescence and prescription as applied to this case.

First, Maryland has never argued that Virginia has waived or relinquished any rights in the Potomac River, but rather maintains only that Virginia has acquiesced in Maryland's

longstanding regulation of those rights. Second, just as the Court is "not bound by state courts' resolution of interstate boundary disputes," *New Jersey v. New York*, 523 U.S. at 782 n.4, the law of one State concerning the authority of its officials does not control the sovereignty of another under the well-settled rule that this Court has applied again and again in recognizing the defense of acquiescence. The many affirmative recognitions by the Virginia Attorneys General and others since the beginning of the 1900s that the boundary is an absolute line of sovereignty are at least as significant as were the statements of the Attorney General of Kentucky that the Court relied upon in addressing the acquiescence defense raised in a boundary dispute between Kentucky and Illinois. *See Illinois v. Kentucky*, 500 U.S. at 386-87. Those opinions expressed by Virginia's chief law enforcement officer, in which he has unambiguously stated in a variety of contexts that Virginia has no authority over the Potomac beyond the low-water mark and that Maryland does, also carry at least as much weight and importance as the "belief of the inhabitants of disputed territory that they are citizens of one of the competing States.'" *New Jersey v. New York*, 523 U.S. at 798 (citing *Maryland v. West Virginia*, 217 U.S. at 41, 44; *Virginia v. Tennessee*, 148 U.S. at 527) (other citation omitted). Those opinions, when considered with the other evidence Maryland has submitted in support of its summary judgment papers – including, but not limited to, the hundreds of letters that the VMRC has written in which it has acknowledged that Virginia does not have any jurisdiction over waterway construction activities beyond the low-water mark and that Maryland does – confirm Maryland's right to regulate the activity at issue in this case.

Virginia also argues that "Maryland's previous litigation positions should estop it

from claiming that Virginia has lost its right to challenge Maryland's permitting system," VA Br. at 136, but it has not identified any past positions or statements made by Maryland that warrant such a result. Indeed, the Maryland Department of the Environment specifically identified in the Maryland administrative proceeding the factual predicate for its acquiescence defense in contending that no person or entity from Virginia had ever challenged Maryland's authority to regulate the Potomac. Virginia has produced no evidence that Maryland did or stated anything in that or any other proceeding that constitutes a "contradictory argument" or is "'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814, 1815 (2001).

Although Virginia argues that "Maryland has twice taken the position in this Court that there will be no 'case or controversy' until a Virginia citizen is actually denied access to the Potomac River," VA Br. at 136, Maryland's position is completely consistent with its acquiescence defense: No case or controversy previously existed precisely because Virginia has long recognized and acquiesced in Maryland's authority over the Potomac. Similarly, contrary to Virginia's assertion that Maryland's position in this case cannot be reconciled with its prior statement that it "has long recognized that Virginians hold riparian rights in the Potomac River," VA Br. at 138 (quoting Maryland), Maryland's recognition of those rights does not mean that they can be exercised without being subject to Maryland regulation. The courts of both States have long recognized that riparian rights are subject to government regulation, *see, e.g., Norfolk City v. Cooke*, 68 Va. 430, 434 (1876); *Baltimore & Ohio R. Co. v. Chase*, 43 Md. 23, 35-36 (1875), and it is Maryland, not Virginia, that has always maintained the right to regulate any activity that occurs on Maryland's side of the boundary

line. Virginia has acquiesced in the exercise of that authority.

In contrast to the inapposite technical arguments that Virginia offers in an attempt to defeat Maryland's acquiescence defense, the Commonwealth presents no substantive proof that generates a genuine issue of material fact. Rather than refute Maryland's evidence, the little evidence that Virginia has offered to show it has not acquiesced in the areas of water appropriation and waterway construction proves just the opposite to be true. In support of its argument that it has not acquiesced in Maryland's assertion of authority over water withdrawals from the Potomac, Virginia points to a letter dated August 5, 1977 (VA Ex. 183) as "evidence" that Virginia stated it "is aware of its rights and intends to protect them," VA Br. at 150, but the letter contains no language of any kind that could remotely be construed as contradicting the Commonwealth's century-long recognition, expressed in a number of ways by a variety of individuals, that Maryland has exclusive regulatory authority over the Potomac beyond the low-water mark.[19] On the contrary, rather than object to

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[19] Virginia is wrong when it states that it "disputed Maryland's claimed authority to regulate Virginia's withdrawals from the Potomac River" within three years after it became applicable to Virginians. VA Br. at 142. Contrary to Virginia's argument that "Maryland's 1933 statute did not apply to Virginia or its municipalities" until 1973, VA Br. at 141, the same term "person" that the Commonwealth contends was used in the 1973 law to broaden the reach of the statute, *id.*, appears in the 1933 statute as well. *See* 1933 Md. Laws Ch. 526, § 4 (MD Ex. CC-4). Virginia also fails to point out that the 1973 law defined the term "person" to include the same "state" or "county, municipal corporation, or other political subdivision of the state" language that Virginia finds so limiting in the 1933 law. *See* 1973 Md. Laws Ch. 4, § 1, MD Ex. DD-4 (recodified definition of "person"). The 1973 definition simply did not change the application of Maryland's appropriation law to Virginians. Indeed, Fairfax County, the Fairfax County Water Authority, the Great Eastern Utilities Corporation, the Potomac Electric Power Company, and the Town of Leesburg all submitted applications prior to 1973 under that law, *see* MD Ex. X, ¶¶ 8-18, and the Governor of Virginia, the Virginia State Water Control Board, and other Virginia agencies were aware that Virginians had been seeking permits under Maryland's appropriation law prior to 1973. *Id.*, ¶¶ 50-53,

(continued...)

Maryland's assertion of authority over the Potomac, Virginia stated in that letter that Virginia "is agreeable to your continued operation of the permit system in the interest of the riparian owners on both sides of the River." VA Ex. 183.[20]

Neither this letter nor the handful of LFAA-related statements that Virginia relies upon (VA Br. at 142-47) defeat Maryland's acquiescence defense because Maryland never wavered but persisted in its "long and continuous possession of, and assertion of sovereignty over, the territory delimited by the transient low-water mark." *Illinois v. Kentucky*, 500 U.S. at 384. *See also New Jersey v. New York*, 523 U.S. at 787 (quoting *Arkansas v. Tennessee*,

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[19] (...continued)
57, 58.

[20] That statement was not made out of the blue. Rather, Virginia has repeatedly stated that "a permit system is needed for the Potomac River, that Maryland has a workable permit system, and that Maryland's system is being administered in a way which is fair to Virginians." Memorandum from Frederick S. Fisher to the Virginia State Water Control Board (Aug. 4, 1977), VA Ex. 182 at 4. *See also* Memorandum of Agreement Between Maryland and Virginia (Oct. 8, 1976), MD Ex. DD-5 at VA-SRC-01437 (acknowledging that "[a]ppropriation permits issued by the State of Maryland have been used as the tool for managing use of the River in both Maryland and Virginia"); "Water Supply and Allocation Problems in Virginia: Report of the Legal Study Subcommittee of the State Water Study Commission" (Nov. 23, 1977), MD Ex. DD-8 at VA-SRC-002275 (stating that "Maryland's permit system on the Potomac River appears to be working well, and to be administered in a manner fair to Virginia"); David E. Evans, Assistant Attorney General, Commonwealth of Virginia, "The Legal Issues – Possible Solutions" (June 10, 1977), MD Ex. DD-6 ("The Maryland permit system is in being and is a mechanism for allocating water. It appears worthwhile and needed, and has been implemented in a fair way."). Indeed, when Virginia considered developing its own water appropriation permitting program in the 1980s, it looked to the Maryland program as a model. *See, e.g.*, State Water Control Board Memorandum (Aug. 21, 1984), MD Ex. DD-10, VA-SRC-000903 (recommending that Virginia enact an "appropriative permit system" that would be "similar to the permit program being used in Maryland"); State Water Control Board Memorandum (Sept. 20, 1984), MD-Ex. DD-11, VA-SRC-00863-65 (recommendation of State Water Plan Advisory subcommittee attached to internal SWCB memorandum stating that establishment of a "water appropriation permitting system, similar to that in existence in the State of Maryland" would "improve management of water resources" in Virginia).

310 U.S. at 570, for the proposition that "sovereign rights to land can be won and lost by 'open, long-continued and uninterrupted possession of territory'"). Indeed, Maryland rejected the suggestion that Virginia made in the 1977 letter referenced earlier that in the future the Commonwealth might create its own permit system for its political subdivisions, stating that "Maryland's appropriation law would still be applicable." VA Ex. 185. Maryland thus made clear that it did not regard Virginia as having any choice about Maryland's regulation of water withdrawals. As the Arbitrators stated in commenting upon a similar assertion of sovereignty that Lord Baltimore made by taking possession of the islands in the Potomac, this is "the most emphatic contradiction" that anyone "could give to any adverse claim, or pretense of claim." (App. 31a.)

Recognizing this, even Virginia's Counsel of Record expressed the concern internally during that time frame that "if Maryland continues to require permits of Virginia localities, and if its permit program is not challenged by Virginia, in time Maryland will acquire by prescription the right to require a permit from Virginia riparian users." VA Ex. 182 at 2-3. Maryland had already "acquired" such a right, however, in light of its longstanding assertion of control over the Potomac. Just as significantly, Virginia's verbal "protest" did nothing to "interrupt the continuity of the other state's adverse claim," VA Br. at 147, but rather gave way to complete capitulation, as Virginia continued to reinforce Maryland's control by foregoing then, as it has through the present day, any permitting system of its own. The Commonwealth reinforced again Maryland's control in the related context of waterway construction activities by referring hundreds of applicants to Maryland because Maryland, and not Virginia, had jurisdiction over such activities. In that context, as in every other

context involving Maryland's regulation of activities taking place beyond low-water mark, Virginia never made any assertion questioning Maryland's authority.[21]

While "inaction alone may constitute acquiescence when it continues for a sufficiently long period," *Georgia v. South Carolina*, 497 U.S. at 393, there is more than mere inaction on the part of Virginia. Notwithstanding Virginia's brief public posturing during the mid-1970s about Maryland's authority to regulate water withdrawals, the Commonwealth has failed to come forward with any proof showing "what its officers have done," *Illinois v. Kentucky*, 500 U.S. at 386, ever, to interfere with, much less stop, Maryland's "continuous and undisturbed exercise of sovereignty," *Arkansas v. Tennessee*, 310 U.S. at 570 (quoting 1 L. Oppenheim, International Law, p. 455 (H. Lauterpacht 5th ed.1937)), over the Potomac River. As Virginia's Counsel of Record cautioned the Virginia Water Control Board 25 years ago, such posturing, "unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, in time, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system." VA Ex. 181 at 3. Despite that warning, the Commonwealth has not identified any "direct Virginia actions" that it has ever taken, prior to filing this lawsuit, to disturb Maryland's continuous exercise of sovereignty over the Potomac River. This suit represents Virginia's "first well-authenticated instance of an effort . . . in the period of over a century" to assert sovereignty beyond the boundary line,

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[21] Indeed, while Virginia states that its Potomac River Riparian Rights Act "reaffirmed Virginia's rights in the Potomac River," VA Br. at 146, its own State Water Control Board, which is mandated by the Act to "advise and assist [Virginia] riparian owners in the proper exercise and protection of their rights," *id.* (quoting Va. Code Ann. § 62.1-44.114), has advised Virginians that Maryland, not Virginia, has the authority to regulate the construction of improvements in the Potomac that take place beyond the low-water mark. *See* n.8, *supra*, and accompanying text.

and "is of substantial weight in indicating acquiescence . . . in the boundary line restricting her jurisdiction to the river at the low-water mark." *Vermont v. New Hampshire*, 289 U.S. at 616. Virginia's claims should be denied because this litigation is too little, too late.

III. A DECISION IN VIRGINIA'S FAVOR WILL CREATE A REGULATORY VOID THAT WILL ADVERSELY AFFECT THE QUALITY AND USE OF THE POTOMAC RIVER.

Contrary to the assertion that Virginia makes in the penultimate section of its brief, a ruling in its favor and against Maryland will do substantially more than merely invalidate Maryland's water appropriation and waterway construction permitting requirements as applied against Virginia users of the Potomac. Although Virginia claims that the requirements of the U.S. Army Corps of Engineers will ensure protection of the environment and the Virginia local political subdivisions will ensure compliance with "the Virginia Uniform Statewide Building Code," Br. at 166, Virginia's localities have stated that they do not exercise their permitting authority for projects beyond low water mark because those projects are considered to be "under the jurisdiction" of Maryland, MD Ex. CC-30, and Congress has stated that the Corps's program is no substitute for a State's regulation of the navigable waters within its boundaries. *See, e.g.*, 33 U.S.C. § 1344(t). Such regulation is part of the States' obligation to manage submerged lands within their boundaries and hold them in trust for the public for navigation and fishing, *Bausch & Lomb Inc. v. Utica Mutual Insurance Company*, 330 Md. 758, 783, 625 A.2d 1021, 1033 (1993), and other public uses. *See, e.g., National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983) (limiting water appropriations to preserve wildlife habitat); *Van Ness v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355 (1984) (access to dry sand beaches). Those trust responsibilities may not be abdicated or bargained

away, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452-53, but that is precisely what will happen if Virginia prevails on its claims.

Indeed, while Virginia denies that a decision in its favor will create a "regulatory void," Br. at 165, Virginia has for years made clear, in the statements of its Attorney General[22] and the legislation of its General Assembly,[23] that it has no jurisdiction over construction activities beyond low water mark on the Potomac River. In an effort to downplay the gap that would occur if Maryland could not carry out its trust responsibilities over the submerged lands it owns off the Virginia shoreline, Virginia notes that Maryland will continue to have jurisdiction over construction activities in the Potomac pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and that, because of its federal origin, "Virginia does not contend that it violates the Compact of 1785 or the Black-Jenkins Award." Br. at 153. In its discovery responses, however, Virginia took a different position and stated that it recognized Maryland's authority to issue water quality certifications only to the extent the exercise of that authority is "consistent with Virginia's federal common law and interstate compact rights." MD Ex. DD-3 (Responses to Maryland's Requests for Admission, Nos. 64-66, 68-70). Virginia is thus being less than candid in purportedly assuring the Court that Maryland's congressionally recognized § 401 authority will "continue," Br. at 153, while trying to preserve the right to contend in any future case that Maryland may not exercise that authority if, in Virginia's opinion, it interferes in any way

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[22] MD Exs. CC-8 through 13.

[23] VA Br. at 159 (stating that under Va. Code Ann. § 28.2-1204 (Michie 1997) "the VMRC does not have any jurisdiction over the Potomac riverbed on the Maryland side of the boundary").

with the exercise of Virginia's riparian rights in the Potomac.[24] This is not, as Virginia claims, an adequate substitute for Maryland's permitting authority, particularly because it makes Maryland's public trust authority to govern activities on its submerged lands contingent upon federal law, which can be changed without Maryland's consent.[25]

A similar regulatory void will exist in the area of water appropriation if Virginia prevails in this case. While Virginia contends that invalidating Maryland's permitting authority over Virginia withdrawals will foster the regional cooperation necessary to "solve future water supply problems," Br. at 168, all of the regional cooperation that has occurred over the past thirty years has taken place under and, according to contemporaneous Virginia statements, *because of* Maryland's permitting authority. *See, e.g.*, MD Ex. X-54, MD-MDE-13122-27 (letter from Virginia State Water Control Board stating that "we are hopeful that under the auspices of the Maryland Water Resources Administration some equitable basis

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[24] Having characterized Maryland's water quality standards as providing "little discretion," Br. at 165, there can be little doubt that Virginia would object to Maryland's water quality certification authority if those standards are expanded to cover explicitly the full range of values potentially protected by § 401. *See, e.g.*, Debra L. Donahue, "The Untapped Power of Clean Water Act Section 402," 23 *Ecology L. Q.* 201, 217 (1996) (noting that as a result of *P.U.D. No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), § 401 allows the States to regulate a wider range activities than simply discharges in order to ensure compliance not only with pollution-related water quality standards but other standards related to designated uses, anti-degradation, and minimum streamflow conditions).

[25] Nor is the Virginia building code adequate. While Virginia building inspectors may inspect wharves and piers off the Virginia shoreline to make sure that they are sturdy and well-maintained, their review is no substitute for the kind of environmental analysis required for more invasive activities, such as the construction of jetties and groins and riverbed dredging. *See, e.g.*, COMAR 26.24.02.03B (requiring consideration of, among other things, project's impact on food sources and habitat for finfish, crustaceons and other aquatic species, anadramous fish spawning grounds, sediment trapping functions, tidal circulation, and littoral drift). Moreover, the Wetlands Boards of Virginia's localities have already declared such projects to be beyond their jurisdiction. *See, e.g.*, MD Ex. CC-30.

for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource"). *See also* Declaration of Herbert M. Sachs, MD Ex. FF, ¶ 13. For its part, Virginia concedes it has done nothing to regulate water use in the Potomac, MD Ex. CC-15 (Interrogatory Response No. 4), even after its Attorney General cautioned that establishing its own permit system was the only way that would protect Virginia's riparian rights. *See* VA Exs. 181 and 182.

In an attempt to assuage any concerns the Court may have about a ruling in its favor, Virginia also contends that "Maryland's permitting system has done nothing to augment or improve the water supply for the Washington Metropolitan Area." Br. at 111-12. Quite the opposite is true. The Maryland water appropriation permitting program (Md. Code Ann., Envt. Art. § 5-501 *et seq.*; COMAR 26.17.06) is principally responsible for the protection and maximization of Potomac water supplies in three separate ways. First, by limiting the amount of water that users are permitted to withdraw to only that amount necessary to meet the user's current needs, the program ensures that water is not wasted or misused. *See* MD Ex. FF, ¶ 10. Second, it is through the Maryland-issued water appropriation permits that the restrictions of the Low Flow Allocation Agreement are made applicable to those users on the Potomac that are not parties to the Agreement. This ensures that users upstream of the Washington Metropolitan Area carry their share during periods of water shortage. *Id.*, ¶ 11. Finally, the Maryland permitting system maximizes water supplies through the application of its so-called "consumptive use regulations" (COMAR 26.17.07), which allow the

Department to head off low flow events.[26]

Ruling in Maryland's favor would leave in place the many ways the Maryland permitting program maximizes existing water supplies while allowing to continue the regional water supply coordination that has developed over the past thirty years, and will also allow Maryland to continue to meet its public trust responsibilities and preserve the ecological health of the Potomac.[27] Leaving Maryland's jurisdiction intact will continue the regulatory framework that has presided over the ascent of the Potomac to an American Heritage River prized throughout the region for its drinking water, recreational opportunities, and historical significance. *See* Executive Order 13061, "Federal Support of Community Efforts Along American Heritage Rivers," (Sept. 11, 1997), MD Ex. DD-12; Presidential

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[26] MD Ex. FF, ¶ 12. With respect to augmentation of the water supply for the Washington Area, it was also Maryland, and not Virginia or its political subdivisions, that took the lead in developing Jennings-Randolph, the single largest reservoir in the Potomac system. When the Corps proposed the reservoir in 1962, Maryland responded by stepping forward to assume the non-Federal costs of the multi-million dollar project and established the Maryland Potomac Water Authority (MPWA) for that purpose. *Id.*, ¶ 6. Although the utilities eventually assumed the MPWA's financial obligations in 1982, it was due to Maryland's action that the reservoir was built and became operational in 1981. *Id.*, ¶¶ 6,7. Virginia, by contrast, had "no comment" on the Corps' 1962 proposal, stating that "no action, financial or otherwise, by Virginia or any of its political subdivisions is needed to satisfy the requirements for local cooperation" and recommending that "future action on the interim report be in keeping with the desires expressed by appropriate officials of the State of Maryland and the State of West Virginia." MD Ex. FF-3, MD-MDE-20009. Virginia also stated that, in its view, the only benefits it would see from the project would be "due to regulation of flow in the Potomac River," which the Virginia Commission of Game and Inland Fisheries clarified "would have some effect upon the fishery in the Potomac River proper which borders Loudoun and Fairfax counties in Northern Virginia," *id.*, MD-MDE-20010, but that "[t]he Potomac, however, is Maryland water and, therefore, it appears we have no direct concern." *Id.*

[27] Far from undermining the reliability of the Potomac River water supply, it has been Maryland that is principally responsible for the protection, augmentation, and maximization of that supply. *See* MD Ex. FF.

Proclamation, "Designation of American Heritage Rivers By the President of the United States of America," (July 30, 1998), MD. Ex. DD-13.

CONCLUSION

For these reasons, the Court should rule in favor of Maryland on its motion for summary judgment and counterclaim because Maryland has acted properly in regulating the Potomac River and has authority to exercise its sovereignty over any activity that takes place in the river beyond the low-water mark.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2002, I sent by overnight delivery copies of the State of Maryland's Reply Brief and supporting papers to Frederick S. Fisher, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219; and Stuart A. Raphael, Esq., Hunton & Williams, 1751 Pinnacle Drive, Suite 1700, McLean, Virginia.

Andrew H. Baida

LODGING

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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

LODGING APPENDIX
ORIGINAL DECLARATIONS

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v.

STATE OF MARYLAND,

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ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

DECLARATION OF CHARLIE C. CROWDER, JR.

I, Charlie C. Crowder, Jr., declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration. I am the General Manager for the Fairfax County Water Authority. I have extensive experience, over 27 years, in planning and operating large metropolitan area water systems. My academic background includes an undergraduate degree in civil engineering from the Virginia Military Institute and a graduate degree in public administration from George Washington University.

2. I attended the public hearings on February 22, 2000 before the House and Senate Committees to which the "Potomac River Protection Bills," Senate Bill 729, and House Bill 395 had been referred. J.L. Hearn, the Director of the Water Management Administration for the Maryland Department of Environment ("MDE"), testified that MDE supported both bills with some minor amendments. Mr. Hearn is the Maryland official who signed the ruling dated December 12, 1997 that denied the Authority's waterway construction permit, and he is the person who, thereafter, declined on behalf of his superiors in Maryland State government even to discuss the terms of any of several settlement proposals advanced by the Authority.

3. Prior to the hearing in the House Committee, I spoke with Mr. Hearn about S.B. 729. During our conversation, Mr. Hearn was asked – if the Van Hollen Bill were passed – whether MDE would issue a waterway construction permit for the Authority's project subject to the limitations set forth in that Bill. Mr. Hearn said he believed that MDE would not issue the permit even for a project that was permitted by the Bill because of the positions that had already

been taken against our project by his superiors. I understood him to mean Maryland Governor Glendening and Secretary of Environment Nishida.

4. I am familiar with the three studies referenced in both versions of the bill. Although the completion of these studies and their presentation to the General Assembly allegedly provides the justification for a new moratorium on construction of water intakes, to the best of my knowledge, none of them addresses any environmental or water supply issue implicated in the Authority's offshore intake project.

5. The Authority's proposed offshore intake project will not increase the Authority's capacity to withdraw water from the Potomac River. The capacity of the offshore intake (approximately 300 million gallons a day ("MGD")) would be 25% smaller than the capacity of the Authority's *existing* shoreline intake (approximately 400 MGD).

6. However, both H.B. 395 and S.B. 729 impose a moratorium on water intake construction that would limit the capacity of the Authority's proposed offshore intake to 205 MGD (the amount of the existing appropriation permit plus 5 million gallons a day). This limitation would frustrate the Authority's plan to construct one offshore intake to supply all its future Potomac River demand (300 MGD), and require the Authority to undertake in-river construction for a second time to enlarge the pipeline in the future (duplicating effort and costs) to complete its plan. While S.B. 729 on its face would permit the Authority to have a replacement offshore intake that is no larger than the Authority's existing intake during the study moratorium, the requirement for a physical component in the pipe to limit water capacity imposes additional, unnecessary costs on the project and ratepayers and, in my view, gives Maryland dangerous authority to restrict the water supply of Northern Virginia.

7. In any case, it is my expectation, as recently confirmed by J.L. Hearn on February 22, 2000, above, that Maryland will continue to delay and impede the Authority's offshore intake project, regardless of the passage of H.B. 395 or S.B. 729, and regardless of results of the three studies referenced in those bills.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: April 27, 2000

Charlie C. Crowder, Jr.

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

DECLARATION OF MARK KRONENTHAL, II

I, Mark Kronenthal, II, declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration.

2. I attended the public hearing on February 22, 2000, of the Senate Economic & Environmental Affairs Committee of the Maryland General Assembly, concerning Maryland Senate Bill 729.

3. The sponsor of S.B. 729, Senator Christopher Van Hollen, stated at the hearing that his legislation, like the bill he proposed the previous year, was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. Senator Van Hollen said that his bill would permit Virginia to have an offshore intake in the Potomac River, but that it would limit the intake capacity to 205 million gallons per day ("MGD"), rather than the 300 MGD capacity sought in the permit application. He stated that the purpose of this limitation was to make sure "they are not fueling more development on the Virginia side of the river, which has been out of control." He stated that a further purpose of his bill was that, since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the right to withdraw water from the Potomac River without Maryland's consent, the limitation

on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval.

4. At the conclusion of the hearing, Senator Clarence W. Blount, the Committee Chairman, remarked that if "Virginia and Maryland were independent states, we would be at war over this."

5. I have also listened to relevant portions of the official audio recordings of the proceedings of the Maryland Senate from March 16, March 17 and March 21, 2000. Those proceedings are available to the public on the Internet at http://mlis.state.md.us/asp/listen.asp. When S.B. 729 as approved by the Senate Committee on Economic and Environmental Affairs was introduced to the full Senate on March 16, 2000 (3/16/00 Senate Recording at 23:41), the floor sponsor said that "what it addresses is the question relating to the County of Fairfax and Virginia's application for a new intake pipe." (3/16/00 Senate Recording at 26:00).

6. S.B. 729 was laid over on March 16, 2000 (3/16/00 Senate Recording at 28:24-29:7), amended on March 17, 2000 (3/17/00 Senate Recording at 51:21, 52:25-58:32), and again on March 21, 2000 (3/21/00 Senate Recording at 1:37:00), to provide an exception (in section 1(c)) that would allow three affected Maryland entities (Pepco, Alleghany Power, and Westvaco) to be exempted from the Bill's prohibition on the construction of water intakes in the Potomac River.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000

Mark Kronenthal, II